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Supreme Court, U.S.
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In The

Supreme Court of the United States

CHRISTIAN ERIK WILLIAMS,

Plaintiff-Appellant-Petitioner, Pro Se,

v.

JPMORGAN CHASE BANK, RAYMOND KONG, STEVE RUTTER, PETER BIBB, GARY FORD, AND ANTHONY SHEFFERD,

Defendants-Appellees-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit, U.S.C.A. 06-1324 (cv), S.D.N.Y. 02-cv-4250

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does current Title VII analysis and NYCHRL analysis abridge the natural-person-employee's First Amendment, Seventh Amendment, Ninth Amendment, and Fourteenth Amendment rights that those United States Constitutional Amendments were meant to protect by viewing corporations through the anti-natural-law construct of "artificial person" and not viewing corporations through the natural-law-compatible construct of "artificial state"?

2. Should allegations of "Workplace Bullying" be considered a form of "intentional infliction of emotional distress", and/or discrimination, and/or retaliation, and/or a violation of the Ninth Amendment inalienable rights of dignity and integrity sufficient to preclude summary judgment when prolonged exposure to manager's "workplace bullying" behaviors results in disabling post-traumatic-stress-disorder and/or when a *prima facie* case of discrimination has been acknowledged by the lower courts, and/or when the corporation viewed as an "artificial state" has repeatedly denied employee's First Amendment right to petition the artificial-state-employer for redress of grievances?

3. When does "workplace bullying" violate the Ninth Amendment "status blind" natural law natural person's inalienable rights of dignity and integrity?

QUESTIONS PRESENTED – Continued

4. Is "constitutional operationalism" constitutional when it uses an "anti-natural-law" construct such as "artificial person"?

5. Would "constitutional operationalism" be constitutional if it used a "natural-law-compatible" construct like "artificial state"?

6. Should the misapplication of the Title VII statute of limitations and standards instead of the NYCHRL three-year statute of limitations and NYCHRL independent standards by the S.D.N.Y. and U.S.C.A. for the Second Circuit preclude summary judgment?

7. Should the omission of the Second Circuit to evaluate this case as a mixed motive separable liability case under NYCHRL preclude summary judgment?

PARTIES TO THE PROCEEDING

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Respondents (Defendants and Appellees below):

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit (U.S.C.A.) in this case as per Supreme Court Rules 10(a), 10(b) and 10(c).

CITATIONS FOR OPINIONS BELOW

The U.S.C.A.'s summary order affirming the Southern District of New York (S.D.N.Y.) was filed April 3, 2008 (App. 1-5). The Civil Judgment of the S.D.N.Y. was filed December 19, 2005 (App. 6-7). The S.D.N.Y.'s (Judge Daniels) order granting summary judgment to defendants was filed on December 16, 2005 (App. 8-20). U.S.C.A. order denying mandamus stating "Petitioner has not demonstrated that the district court usurped its power" was filed on February 24, 2006 (App. 21-22). Judge Daniels' order denying request for oral argument was filed August 29, 2005 (App. 23). Judge Daniel's order denying Secretary of Labor Authorization to Grant, Deny, or Revoke "Authorized Private Action" in OSHA Claims was filed on March 14, 2002 (App. 24-29). Judge Daniels' order removing Former Attorney was filed October 11, 2002 (App. 30). SSA Appeal Decision was filed April 13, 2005 (App. 32-40).

BASIS FOR JURISDICTION IN THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review on writ of certiorari the

opinion of the U.S.C.A. Second Circuit entered on April 3, 2008 affirming the opinion of the S.D.N.Y.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Seventh Amendment: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Ninth Amendment: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment: 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York City Human Rights Law (NYCHRL): Administrative Code of the City of New York Title 8 [http://www.nyc.gov/html/cchr/pdf/hrl.pdf]

§ 8-107 Unlawful discriminatory practices

1. Employment. It shall be an unlawful discriminatory practice:

(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency or an employee or agent thereof to discriminate against any person because of such person's actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants for its services to an employer or employers.

(c) For a labor organization or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or

alienage or citizenship status of any person, to exclude or to expel from its membership such person or to discriminate in any way against any of its members or against any employer or any person employed by an employer.

(d) For any employer, labor organization or employment agency or an employee or agent thereof to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status, or any intent to make any such limitation, specification or discrimination.

§ 8-502 Civil action by persons aggrieved by unlawful discriminatory practices.

(a) Except as otherwise provided by law, any person claiming to be aggrieved by an unlawful discriminatory practice as defined in *chapter one* of this title or an act of discriminatory harassment or violence as set forth in chapter six of this title shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, unless such person has filed a complaint with the City Commission on Human Rights or with the

State Division of Human Rights with respect to such alleged unlawful discriminatory practice.

[....]

(d) A civil action commenced under this section must be commenced within three years after the alleged unlawful discriminatory practice or act of discriminatory harassment or violence as set forth in chapter six of this title occurred. [....]

STATEMENT OF THE CASE

NATURE OF THE CASE

This action is an employment discrimination, hostile work environment, retaliation, personal psychiatric injury (NYCHRL and NYSHRL), intentional infliction of emotional duress (IIED), and negligent infliction of emotional duress (NIED) action, in which plaintiff-appellant-petitioner (petitioner), former JPMorgan Chase Bank employee asserts defendants-appellees-respondents (respondents) terminated his employment because of his sexual orientation (homosexual) and the mistaken perception that he was HIV+, and as a result of prolonged exposure to manager Kong's "Workplace Bullying" environment incurred disabling psychiatric injury Post-Traumatic-Stress-Disorder (PTSD) pursuant to the tenets of Social Security Rulings 85-15 and 96-8p (App. 32-40) in violation of New York City Human Rights Law ("NYCHRL") and New York State Human Rights Law ("NYSHRL").

COURSE OF PROCEEDINGS

The original action was filed in New York State Supreme Court on May 2, 2002 asserting causes of action under NYCHRL and NYSHRL for sexual orientation discrimination and perceived disability HIV+ discrimination. Defendants removed the action on June 6, 2002 and thereafter filed an Answer to the Complaint.

Closely after September 13, 2002 Ms. Bonnaig filed a motion to withdraw as counsel. On October 11, 2002, petitioner cross-motioned to have her "removed for cause" and requested the S.D.N.Y. to order refund of his $15,000 contingency fee. Judge Daniels ruled the same afternoon simply removing counsel (App. 30). As such petitioner re-asserts Judge Daniels irreparably damaged petitioner's ability to obtain and retain new counsel as a pro se litigant disabled under the law with PTSD leaving petitioner without funds to obtain and retain new counsel by failing to order refund of his contingency fee and not removing counsel for cause.

Proposed Amended Complaint was submitted to Judge Daniels about December 11, 2002. Permission to re-file was received at the case management meeting in late January 2003. The Amended Complaint added OSHA claims, several defendants, retaliation, psychiatric injury, IIED, and NIED claims. Defendants motioned to remove OSHA claims and remand back to New York State (NYS) Supreme Court. In response, petitioner wrote to the Secretary of Labor

seeking permission for "authorized private action" to enforce OSHA claims. Without hearing or argument, Judge Daniels ruled (App. 24-29) the Secretary of Labor had no enforcement authority to grant, deny, or revoke "authorized private action," and denied motion to remand. Petitioner filed Second Amended Verified Complaint on March 25, 2003 restoring complete diversity.

Defendants moved for Summary Judgment in March 2004. Petitioner submitted opposition papers in July 2004 (AP-3-004-126), defendants replied in August 2004. In December 2004 an article regarding Judge Daniels' performance appeared in the New York Times and had the effect of exacerbating petitioner's condition (AP-1-395, App. 128-130). Petitioner wrote to Judge Daniels and not having received any reply, entered a petition for writ of mandamus with the U.S.C.A. Mandamus was denied without prejudice to renew. On August 19, 2005, Magistrate Dolinger issued a Report and Recommendation that defendant's motion for summary judgment be granted (AP-1-318-391). The S.D.N.Y. denied requested oral argument. Petitioner filed timely objections on November 22, 2005 (AP-3-164-194) and simultaneously renewed his petition for writ of mandamus asking that the Report and Recommendation be thrown out because it put the evidence in the most favorable light of the "moving" party instead of the "non-moving" party doing the opposite of what was required by law. On December 16, 2005, the S.D.N.Y. adopted the Report and Recommendation adding a

few statements pertinent to petitioner's objections (App. 8-20). On December 19, 2005, the Clerk entered Judgment (App. 6-7). On January 5, 2006, petitioner filed Notice of Appeal (AP-1-028). On February 24, 2006 the U.S.C.A. denied mandamus stating "Petitioner has not demonstrated that the district court usurped its power" (App. 21-22). Petitioner filed a 123-page appellate brief about October 3, 2006. As per the pro se team, petitioner motioned for permission to enter oversized brief. The U.S.C.A. rejected petitioner's motion and petitioner filed reduced thirty-page brief about December 18, 2006 within the five-day deadline. Defendants responded in February 2007. Petitioner entered his reply about March 20, 2007. Petitioner asserted that current Title VII Analysis was tendentiously corporatist and perniciously anti-employee because it viewed corporations as "artificial persons" and not as "artificial states"; as "artificial states" petitioner asserted his "First Amendment" rights were violated by defendants. Petitioner also asserted his observation that this error was contributing to the breakdown of the "Complaint Against Judicial Officers" procedure 28 U.S.C. § 351. The U.S.C.A. granted oral argument of five minutes on March 10, 2008 which limited argument to the assertion that Judge Daniels irreparably damaged petitioner's ability to obtain and retain new counsel by failing to remove his attorney for cause and failing to order refund of his $15,000 contingency fee. On April 3, 2008 the U.S.C.A. issued its ruling affirming the S.D.N.Y. (App. 1-5).

FOUNDATION

> With respect to both his intentional infliction of emotional distress claims and his discrimination claim, plaintiff also argues that Magistrate Judge Dolinger should have formulated new legal guidelines and rules because there is no scientific support for the current jurisprudence. Plaintiff asserts that this Court should be compelled to create a "new and corrected standard test that reflects the currently evolved knowledge of harassment, hostile work environment, organizational behavior, workplace bullying, and the typology of organizational response to allegations of 'workplace bullying.'" Under this test, the plaintiff asserts that the nexus between his psychological injury and defendants' conduct should be sufficient to raise triable issues of fact relating to defendants' liability. [S.D.N.Y. Order App. 8-20].

STATEMENT OF FACTS AS TO HARASSMENT AND DISCRIMINATION

The petitioner was employed by Chase from 1995 to 2001 as an Information Systems Specialist in the Training Operations and Systems Department. His starting salary was $70,000 per year. On a scale of "1" to "5," "1" being the highest petitioner received a "2" rating from manager Dorothy Cunha in January 1996; he received a "2" rating from manager Tom San Pietro in January 1997 and was promoted to officer. In August 1997, Mr. San Pietro left Chase and defendant Kong came into petitioner's chain of command.

Prior to Kong becoming petitioner's supervisor, petitioner's salary increased from $75,000 to $93,000 per year. After defendant Kong became petitioner's supervisor, bonuses stopped and raises were limited to one $1,500 raise and petitioner's review rating went down to "3." In 1997 Kong referred to petitioner as "Christine." In 1999, defendant Kong advised the petitioner that "arguing with you is like arguing with my wife" and then banned the petitioner from PERL programming undermining his performance and ability to support customers. On November 2, 1999 petitioner complained directly to Kong in an email about Kong's blackballing behavior toward petitioner (docketed Ex. X, AP-5 Page 155) (this is well within the three year NYCHRL statute of limitations). While Kong never spoke this to petitioner, Kong wrote in petitioner's review that "his personal life affects his work." In 1999 petitioner complained to human resources generalist Gayle Prescod that Kong was treating petitioner in the same bad way that he had treated former employee Robert Fisch (App. 120-122) and that petitioner thought Kong might be acting in an anti-gay manner. In response Ms. Prescod did nothing to investigate Kong. In January 1999, the petitioner had received a performance rating of "3"; the evaluation was co-signed by defendant Kong. In late July 1999, defendant Kong opened petitioner's Health, Life, and Disability coverage Statement which listed petitioner's male domestic-partner. (AmComp. docketed Ex. H) Kong unreasonably denied the petitioner's request to work on direct customer requests. Petitioner was solely required to write weekly status reports impeding his workflow;

Kong repeatedly unjustifiably threatened petitioner with job review retaliation saying "this will be reflected in your review" and subsequently termination threats by both defendants Kong and Rutter. Kong systematically excluded petitioner from important job functions, design meetings, customer meetings and JAVA assignments undermining petitioner's performance. Also in 1999 Dr. Goldstein began treating petitioner for what he thought was ordinary depression but was in reality developing "Prolonged-Duress-Stress-Disorder" (PDSD) (App. 143-144, App. 125-127). Kong also stole credit for petitioner's work, denied his contributions, assigning less challenging tasks than to his less qualified coworkers, assigned a barrage of disparate technology tasks solely to petitioner to make him repeatedly jump through various technology hoops to further undermine his performance. Kong repeatedly raising his voice in meetings in front of his colleagues, reprimanding and belittling petitioner, and regularly acted in a belligerent and antagonistic manner towards the petitioner (App. 120-122 vis a vis App. 113-119). Kong refused to upgrade petitioner's personal computer to a functional software developer level, in an apparent insidious effort to sabotage petitioner's productivity. In April of 2001 petitioner complained to defendant Shefferd that Kong was blackballing him. Defendants Shefferd and Chase did nothing to investigate Kong. (Objections App. 41-102). Despite petitioner's complaints about Kong to defendants Shefferd, and Rutter, as well as three times to human resources, no one in a position of authority over Kong would permit

an independent review of the petitioner's job performance. Petitioner's request to work for an "honest and straightforward" manager was also unreasonably denied.

About April 2001, defendant Kong wrote an evaluation which petitioner never saw until it was produced in discovery; Kong wrote "Overall, Christian doesn't fit the current and future work environment of my group, and perhaps any other groups within IB." On the contrary, petitioner was the sole JAVA certified member of the team and the most qualified employee for the type of work Kong's group was performing (docketed Ex. AC, AP-4 CEW 004-6). Kong's insidious evaluation of petitioner was completed subsequent to defendants Prescod, Rutter, and Bibb being advised by petitioner that it was impossible for Kong to give petitioner a fair and impartial review, and subsequent to defendant Chase's multiple denial of petitioner's multiple requests for an independent 360-degree review where Kong did not take part, and subsequent to Rutter and Shefferd not allowing Kong to give petitioner any 2000 review. Not having received any 2000 review, petitioner could not rebut it.

About June 6, 2001, Kong told petitioner his JAVA Group Server would not be used in the new JAVA Leave-Order-Processing-System (LOPS) because it had a bug in it, he could not understand petitioner's JAVA code, and that Vidya's server would be used instead. (PL TR [#2] 80:23-83:25). Subsequently Srividya (Vidya) Gopalakrishnan told petitioner her

group server was simply a copy of petitioner's group server, and the bug was Kong's own dbaccess routine bug. When asked if she could understand petitioner's JAVA code, Vidya responded that she could understand petitioner's code and that Kong was "out to get you Christian."

Petitioner was given notice of termination on June 28, 2001, and told that his position was being *eliminated.* In reality his effective LOPS team job-role and position continued to exist and was taken away from petitioner and given to a less qualified employee. Discovery uncovered that defendant Chase had conducted a flawed impact study that did not consider petitioner to be gay, therefore a member of NYCHRL and NYSHRL protected status group.

After filing the case, another employee complained about Kong's discriminatory behavior. Chase had Ms. Shannon Terry perform a climate study resulting in a written warning to Kong (App. 113-119). The disparate treatment of petitioner's complaints vis a vis the new complaints is indicative of discriminatory "acts of omission" against petitioner by defendant Chase. The investigation established as fact many complaints that petitioner had made which Chase had ignored for years.

In July 2002, urged by Ms. Torres-Esteves (App. 139-142) petitioner commenced treatment with a psychiatrist, Henry Beaulieu, M.D. Dr. Beaulieu's statement of October 8, 2002 states Mr. Williams is suffering from acute post traumatic stress disorder

("PTSD") and prolonged duress stress disorder ("PDSD") as a result of being psychologically abused at work and "cruelly packaged out by his boss Mr. Raymond Kong" (App. 123-127). Dr. Beaulieu directed petitioner to apply for Social Security Disability because of petitioner's PTSD. Dr. Beaulieu died of pancreatic cancer in April of 2003.

In June/July of 2003 petitioner was deposed over three non-consecutive days with no lawyer because Judge Daniels irreparably damaged his ability to obtain and retain new counsel. The petitioner is still in treatment for and on Social Security Disability because of his PTSD. Petitioner started seeing psychiatrist Dr. Marthe Abraham about September 2003. Dr Abraham's two affirmations are attached (App. 128-130, App. 131-133).

REASONS FOR GRANTING CERTIORARI

1. THERE ARE AT LEAST TWO MAJOR INFIRMITIES IN THE SECOND CIRCUIT'S ANALYSIS

Discrimination Under the New York City Human Rights Law (NYCHRL)

Sexual orientation discrimination is actionable under New York City Administrative Code § 8-107(1)(a), also known as the "New York City Human Rights Law" ("NYCHRL") and has a three-year statute of limitations under § 8-502 "Civil action by persons aggrieved by unlawful discriminatory practices." The misapplication by the Second Circuit of

the 300-day statute of limitations instead of the NYCHRL (§ 8-502(a), (d)) three-year statute of limitations is a fundamental infirmity in the current analysis of this case.

The Local Civil Rights Restoration Act (LCRRA) of 2005 was enacted on October 3, 2005 and states that the purpose of the Act is to clarify the scope of the City's Human Rights Law. The Act states that the Human Right's Law has been construed too narrowly. Through this local law the counsel sought to underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of the New York State or Federal statutes. (Section 1 of the Local Civil Rights Restoration Act of 2005; *Sorrento v. City of New York*, 17 Misc.3d 1102(A) (Sup. Ct. NY County 2007); *Farrugia v. North Shore University Hospital*, 13 Misc.3d 740 (Sup. Ct. NY Court 2006). Federal and State Civil Rights Law are a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise. (Section 1 of the Local Civil Rights Restoration Act of 2005 1102(A) (Sup. Ct. NY County 2007); *Farrugia v. North Shore University Hospital*, 13 Misc.3d 740 (Sup. Ct. NY Court 2006)).

New York City Human Rights Law Cases

MAJOR INFIRMITY NO. 1

> ***I) Kassner v. 2nd Avenue Delicatessen,*** ___ F.3d ___, 2007 WL 2119769 (C.A.2 (N.Y.)) Plaintiffs-appellants, who sued alleging age discrimination and retaliation by defendants-appellees in violation of Federal, New York State, and New York City laws, appeal the judgment of the United States District Court for the Southern District of New York (**George B. Daniels, *Judge***) [....] For the reasons stated, we conclude that the district court properly dismissed Kassner's claims of alleged discriminatory assignments, erred in dismissing her implied claims of hostile work environment, and properly dismissed her claims of retaliation. With respect to Reiffe, we conclude that the district court properly dismissed the untimely claims of alleged discriminatory assignments but erred in dismissing other such claims that were timely, properly dismissed any implied claim of hostile work environment, and erred in dismissing those of her claims of retaliation for which relief was not time-barred. ___ F.3d ___, 2007 WL 2119769 (C.A.2 (N.Y.)).

As in that case, Judge Daniels has not appropriately applied the NYCHRL three-year statute of limitations on the evidence presented and this is a major infirmity in the analysis which the U.S.C.A. should have caught.

MAJOR INFIRMITY NO. 2

> ***II) Sanabria v. M. Fabrikant & Sons, Inc.,*** Index No. 113378/2002 (Sup. Ct. N.Y. Cty. March 21, 2008). Court, heeding admonition of Restoration Act to read the text of the Human Rights Law, finds that the law clearly provides for individual liability: "Unlike its Federal and State counterparts, the New York City Human Rights Law specifically defines employee as someone who can be found liable. Section 8-107 of the New York City Administrative Code states that it shall be an unlawful discriminatory practice for 'an employer or agent thereof' to discriminate based on sex [and sexual orientation]. Therefore, the New York City Human Rights Law contains a statutory basis for individual employee liability and [the individual defendant] may be held individually liable for his conduct."

Therefore, the New York City Human Rights Law contains a statutory basis for individual employee liability and defendant Kong may be held individually liable for his conduct. The Second Circuit has not analyzed this case as a mixed motive case with regard to defendant Kong actions which is a second major infirmity in the analysis with the U.S.C.A. should have caught. The Second Circuit's Title VII analysis was misapplied to this NYCHRL case. Further, the Second Circuit has *sub-silencio* denied the unchallenged connection and psychiatric findings between petitioner's protracted exposure to Kong's workplace bullying behavior and petitioner's PTSD.

The connection between Kong-like-behaviors and PTSD is included in the current New York State Healthy Workplace Bill A-10291 (App. 103-112) which would create a "status blind" cause of action for "Abusive Work Environment." That bill states an abusive work environment may be one solely consisting of "THE GRATUITOUS SABOTAGE OR UNDERMINING OF AN EMPLOYEE'S WORK PERFORMANCE." Many of Kong's acts were performance sabotaging and performance undermining, and according to the bill such an environment can result in PTSD like that incurred by petitioner. Further, implied by the bill is that such PTSD injury is not "intrinsic to the job" and therefore not currently a valid defense covered by New York State Workman's Compensation Law as misinterpreted by the Second Circuit.

> ***III) Bourne v. Consolidated Edison***, Index No. 1783/2006 (Sup. Ct. Kings Cty. March 8, 2008). In short form order, Court finds that defendant's papers "did not make out a case for entitlement to dismissal under the City law, only discussing state and federal discrimination case law. Discussion of state and federal decisions are insufficient as a matter of law to state a claim for dismissal under the City law pursuant to the New York City Human Rights Law Restoration Act of 2005."

This should mean all NYCHRL jurisprudence against employees prior to the remedial restoration act of 2005 should be questionable by a jury.

IV) Selmanovic v. NYSE Group Inc., 2007 WL 4563431 (S.D.N.Y. December 21, 2007). Court recognizes that City Council intended for the City Human Rights Law to be interpreted more broadly than its state and federal counterparts, *id.* at *4, **that the anti-retaliation provisions cover retaliation "in any manner,"** *id.* at *5, and reciting the enhanced liberal construction provision of the 2005 Restoration Act (Admin. Code § 8-130) **to the effect that the provisions of the City Law "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed,"** *id.* (citing *A Return to Eyes on the Prize*).

To dismiss a NYCHRL claim the Second Circuit should have relied solely on decisions made by juries after the passage and jury consideration of the remedial NYC Human Rights Restoration Act. This did not occur. Abuse of managerial position through the use of performance maligning, performance sabotaging and blackballing should qualify under NYCHRL as insidious discrimination, retaliation, and hostile work environment conduct that alters the conditions of employment sufficient to preclude summary judgment on these NYCHRL claims. Defendant Kong, through his misconduct, and defendant Chase, through its tolerance of this misconduct, created a hostile and abusive work environment for plaintiff and evidenced

discriminatory intimidation through abuse of his power of position which over a protracted period of nearly four years caused petitioner to incur the extreme disparate affect of PTSD. As the original case was filed on May 2, 2002, all acts by Kong after May 2, 1999 fall within the statute of limitations. For the purpose of summary judgment Kong's motive(s) for blackballing plaintiff and causing disabling psychiatric injury should be viewed in the most favorable light of the non-moving party, the petitioner, as discrimination. Under NYCHRL "retaliation" is an "unlawful discriminatory practice" and therefore requires no discriminatory animus. "Retaliation. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person." [NYCHRL § 8-107] Blackballing is axiomatically by definition discrimination of some type. Subsequent to petitioner's complaints of blackballing to management Kong was permitted to orchestrate petitioner's termination and stated in a review "Overall, Christian doesn't fit the current and future work environment of my group, and perhaps any other groups within IB." Evidently Kong didn't just want petitioner off his team, Kong wanted petitioner out of the bank entirely. The Second Circuit has not stated what Kong's motives were for wanting petitioner out of the bank entirely, nor what Kong's motives were for his abusive treatment of petitioner such that petitioner incurred disabling PTSD. The statement by Kong is insidious abusive interference with the employee-employer relationship and a

violation under NYCHRL which the Second Circuit misapprehended and under which Kong may be held separately liable.

2. THE SECOND CIRCUIT'S TITLE VII ANALYSIS HAS INCONSISTENCIES WITH BOTH THE NINTH CIRCUIT AND THE STATE OF INDIANA

EEOC v. NEA (2005 WL 2106164 (9th Cir. (Alaska)))

While *EEOC v. NEA* deals mainly with overt and blatant hostility, its Title VII analysis rationale is relevant to this case which deals with more insidious and covert workplace bullying psychologically abusive harassment.

> We now hold that evidence of differences in subjective effects (along with, of course evidence of differences in objective quality and quantity) is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex – or gender-specific. The record reveals at least a debatable question as to the objective difference in treatment of male and female employees, and strongly suggests that difference in subjective effects were very different for men and women.... A few instances of hostile behavior toward male employees – which the record suggest may have had a qualitatively different, "bantering" character – do not erase the possibility that a reasonable jury might find that the

> pattern of abuse directed at female employees was discriminatory. (2005 WL 2106164 (9th Cir. (Alaska))).

Correspondingly Kong's psychologically abusive behaviors perceived by the Second Circuit as abusive of all Kong's employees cannot erase the possibility of gay discrimination, perceived HIV+ discrimination, hostile work environment, or retaliation. "Uniform abuse" is not grounds to dismiss a NYCHRL lawsuit, it is grounds to expand the lawsuit to a class action for NYCHRL hostile work environment, retaliation, and violations of the Ninth Amendment inalienable human rights of dignity and integrity. Even if defendant Kong had used similar behaviors against heterosexual employees, he cannot thereby "cure" his conduct toward gay men. Title VII Analysis for NYCHRL and NYSHRL purposes must consider what is offensive and hostile to a "reasonable homosexual" or better yet a reasonable employee's expectation of "liberty" under the Fourteenth Amendment to be free from "the gratuitous sabotage or undermining of an employee's work performance by an artificial state or agent thereof." While the district court stated that petitioner had proven his *prima facie* case of discrimination, the district court erred in that it required sexual orientation specific conduct beyond that required for a *prima facie* case and misapplied title VII analysis instead of using the more liberal, remedial, and independent and evolving NYCHRL standards.

Disabling Acute Complex PTSD is a very clear and extreme subjective effect Plaintiff incurred different from all other employees. The conduct in question was constant over a period of nearly four years which is four times as long as the next employee. Even if Kong's abuse were evenly distributed Plaintiff would still have received over four times the abuse as any other employee on the team at the time of Plaintiff's termination. The protracted time alone represents a definite quantitative difference. Judge Dolinger recognized a qualitative difference in the selection process disconnect and the fact that petitioner became psychologically injured to the point where "Kong's very presence appeared to turn his work environment hostile" [(MHD) Report-Rec. 59] but does acknowledge the nexus between Kong's abusive acts and the onset of petitioner's psychiatric injury. Together the duration and severity level of Kong's behavior were sufficient to cause acute psychiatric injury and should meet the "varying inversely" rule; Judge Dolinger does not apply this rule appropriately for NYCHRL. Judge Dolinger appears to recognize that Plaintiff's psychiatric injury was developing, but does not state so in his favor. His honor states: "Williams may have been more sensitive than others on the team to Kong's treatment of him." [(MHD) Report-Rec. 35] His honor recognized that Plaintiff was "hypersensitive" a symptom of his then-developing PTSD but does not state that fact in Plaintiff's favor. Judge Dolinger fails to recognize that Kong's environment was a constant chronic

workplace stressor. [Petitioner's Objections to MHD Report and Recommendation App. 41-102].

The *Raess v. Doescher* Case [Indiana Supreme Court No. 49S02-0710-CV-424] (IIED)

The Indiana Supreme Court has recognized that the rubric of "Workplace Bullying" actions could be considered a form of intentional infliction of emotional distress appropriate for a jury.

> At the point the jury was instructed, both the plaintiff's claims for assault and for intentional infliction of emotional distress were before the jury. The tendered instruction advanced two concepts: (a) that "workplace bullying" was not an issue in the case, and (b) that the jury need not determine whether the defendant was a "workplace bully" to decide the case. As to the first concept, we disagree. In determining whether the defendant assaulted the plaintiff or committed intentional infliction of emotional distress, the behavior of the defendant was very much an issue. The phrase "workplace bullying," like other general terms used to characterize a person's behavior, is an entirely appropriate consideration in determining the issues before the jury. As evidenced by the trial court's questions to counsel during pre-trial proceedings, workplace bullying could "be considered a form of intentional infliction of emotional distress." Tr. at 58; *see also id.* at 62. In seeking to tell the jury that "workplace bullying" was not an issue in the case, the

> tendered instruction was incorrect. Furthermore, in seeking to advise the jury that "workplace bullying" was not an element in the case, the tendered instruction was unnecessary. Other instructions adequately informed the jury of the elements of each of the plaintiff's causes of action. It was not necessary to emphasize to the jury that non-listed elements were not elements. We find that the trial court here did not abuse its discretion in refusing the tendered instruction. [*Raess v. Doescher* Indiana Supreme Court No. 49S02-0710-CV-424, decided April 8, 2008].

The Indiana Supreme Court decided that "workplace bullying" was an issue in the case for purposes of the IIED claim. The Second Circuit has misapprehended Kong's "workplace bullying" actions as "legitimate-management-decisions," even though there is no legal definition of "legitimate-management-decisions," instead of as performance undermining, performance sabotaging, discriminatory, and retaliatory actions under NYCHRL analysis. Further, the Second Circuit has not sufficiently looked at this case as a mixed motive case for which Kong may be held separately liable. In the reply brief of petitioner's appeal the U.S.C.A. for the Second Circuit was asked to:

> (1) Read the workplace bullying educational materials submitted in the appendix for this case (AP-2-342 to 537); and
>
> (2) Seek immediate advice from the Supreme Court of the United States on the

Constitutional Issues Presented by my case with no further abuse of my pro se status or PTSD condition from the judicial process and no-abusive-cert-writ-process required from me; and

(3) Ask the Supreme Court of the United States as to whether or not dual Title VII analysis methodologies ought to be used on all current Title VII Analysis cases with the alternative perspective of "artificial state" until such time as the Supreme Court may rule that the existing methodology has built in tendentiously corporatist perniciously anti-employee bias; and

(4) Ask the Supreme Court of the United States to define a "motive" based definition of "legitimate management decisions"; and

(5) Ask the Supreme Court of the United States to review the current standards of IIED which I assert have little or no scientific foundation and ignore the multitude of factors that effect employees' decisions and abilities to quit a job; and

(6) Ask the Supreme Court of the United States whether a diagnosis of PTSD caused by "Psychological Abuse" of a manager is sufficient to overcome summary judgment on an "oppressively hostile" work environment claim, discrimination claim, or IIED claim as severe disparate effect with or without being disabled under law for such condition; and

> (7) Ask the Supreme Court whether or not all misconduct complaints regardless of their dismissability ought to be scanned and electronically saved as they likely contain evidence of systemic methodological analytical error at least with regard to Title VII Analysis cases which in turn generate complaints which may be data indicators of jurisprudence that is too narrow in scope to fulfill the spectrum of the law.

To the best of my knowledge the U.S.C.A. has not acted on any of the aforementioned requests including incorporating any of the workplace bullying educational materials (AP-2-342 to AP-2-537) provided into their review as evidenced by my objections (App. 41-102). Further active legislation in the New York State Assembly makes the connection that Kong-like-behaviors cause post-traumatic-stress-disorder like that incurred by petitioner. [*See* New York State Assembly Bill A-10291, App. 103-112]. When bill A 10291 or its successor passes, it will create a status blind cause of action for "Abusive Work Environment." The bill states that abusive conduct can be solely "THE GRATUITOUS SABOTAGE OR UNDERMINING OF AN EMPLOYEE'S WORK PERFORMANCE." The bill also defines "ABUSIVE WORK ENVIRONMENT" to be "A WORKPLACE IN WHICH AN EMPLOYEE IS SUBJECTED TO ABUSIVE CONDUCT THAT IS SO SEVERE THAT IT CAUSES PHYSICAL OR PSYCHOLOGICAL HARM TO SUCH EMPLOYEE." The bill also defines "PSYCHOLOGICAL HARM" to be "THE MATERIAL

IMPAIRMENT OF A PERSON'S MENTAL HEALTH, AS DOCUMENTED BY A COMPETENT PHYSICIAN OR SUPPORTED BY COMPETENT EXPERT EVIDENCE AT TRIAL." My Psychiatrist, Dr. Abraham would qualify as such (App. 128-133). If NYS A-10291 were the law today, the S.D.N.Y. could have granted me summary judgment instead. But NYS A-10291 is not yet the law, but it does by definition highlight deficiencies in all Title VII analysis.

A cause of action for the intentional infliction of emotional distress exists by an employee against his employer, if the acts complained of, as in the present case, "amount to extreme and outrageous conduct which cannot be tolerated in a civilized community." *See Vasarhelyi v. New School for Social Research*, 230 A.D.2d 658, 646 N.Y.S.2d 795 (1st Dept. 1996), in which the court found the existence of a cause of action for the intentional infliction of emotional distress by a former employer against his employee and held:

> We do not agree with Supreme Court that defendants' actions constitute mere "threats, annoyances or petty oppressions or other trivial incidents which must necessarily be expected and are incidental to modern life no matter how upsetting" (citing, *Ruggiero v. Contemporary Shells,* 160 A.D.2d 986, 987, 554 N.Y.S.2d 708 [quoting *Lincoln First Bank v. Barstro & Assoc. Contr.*, 49 A.D.2d 1025, 374 N.Y.S.2d 485]). It has been noted that "where severe mental pain or anguish is inflicted through a deliberate and malicious

> campaign of harassment or intimidation, a remedy is available in the form of an action for the intentional infliction of emotional distress" (*Nader v. General Motors Corp.*, 25 N.Y.2d 560, 569, 307 N.Y.S.2d 647, 255 N.E.2d 765; *Doe v. American Broadcasting Cos.*, 152 A.D.2d 482, 483, 543 N.Y.S.2d 455). That this jurisdiction does not recognize a cause of action for the "abusive or wrongful discharge" of an at-will employee (*Murphy v. American Home Prods.*, 58 N.Y.2d 293, 302, 461 N.Y.S.2d 232, 448 N.E.2d 86) does not dictate the result that an employer's outrageous conduct or severe abuse must be condoned, simply because it is directed at an employee preliminary to termination (*see, Elson v. Consolidated Edison Co.*, 226 A.D.2d 288, 641 N.Y.S.2d 294), 230 A.D.2d at 661.

Kong subjected and Chase allowed Kong to subject petitioner to protracted workplace bullying sufficiently severe as to cause him disabling psychiatric injury a violation of petitioner's inalienable Ninth Amendment natural right to dignity and integrity for which the most natural cause of action is "Intentional Infliction of Emotional Distress." The Indiana Supreme Court states "workplace bullying" can be considered a form of intentional infliction of emotional distress appropriate for a jury. Petitioner has suffered severe emotional injuries and loss of income as a result of Kong's preventable mistreatment and both Chase and Kong should be held separately liable. A corrected standard for intentional infliction of emotional distress ought to include a reasonable

employee's expectation of "liberty" under the Fourteenth Amendment to be free from "the gratuitous sabotage or undermining of an employee's work performance by an artificial state or agent thereof" if not also reasonable employee's First Amendment right to petition the artificial state for appropriate redress of grievances. In the United States good and honest management used to be a requirement for a company to maintain the state granted privilege of incorporation. (Hon. Justice Brandeis Dissenting, *Louis K. Liggett Co. et al. v. Lee, Comptroller et al.*, 288 U.S. 517 (1933) (AP-3-332)).

3. THERE ARE SIGNIFICANT FACTS IN DISPUTE APPROPRIATE FOR A JURY

The Second Circuit has *sub-silencio* denied the unchallenged connection between defendant Kong's workplace bullying behaviors and petitioners disabling psychiatric injury. Multiple psychiatrists have made the connection. The connection itself is the textbook result of prolonged exposure to Kong's textbook workplace bullying behaviors (App. 113-119, AP-4 JPM-555 to 557).

> In determining whether plaintiff has met his burden to show there is sufficient potential proof for a reasonable jury to conclude that the legitimate reasons offered by defendant were merely a pretext for retaliation, the court should note that the factual evidence

> concerning what happened to plaintiff is largely disputed[1], and that plaintiff-appellant states it is a fact that Kong maintained an oppressively hostile work environment for years while plaintiff-appellant worked for him; that the types of behaviors of Defendant Kong outlined in exhibits (App. 113-122, AP-4 JPMC 000555 through AP-4 JPMC 000557) were not at all new types of behaviors by defendant Kong. While Kong's targets varied over the years, Kong engaged in those types of behaviors throughout the period. Further, the interpretation by the district court of Ms. Shannon Terry's affidavit and other evidence is that these behaviors by defendant Kong were "new" but that suddenly Kong's behavior changed after being a manager for nearly six years whereby Kong suddenly engaged in the behaviors described in JPMC 000555-557 and he needed the remedial management classes of "Microinequities" and "Fundamental Management Skills" (JPMC 000557). This interpretation by the district court is not rational (Appellant Brief Pg 19-20).

Either Ms. Terry is mistaken about Kong's behaviors being "new" because they were "new to her" or she has indeed committed perjury in this civil case! That is also a question appropriate for a jury. At any rate petitioner had never even known of

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[1] Read Rule 56.1 Statement AP-3-127 to 163, Read Plaintiff's Memorandum Of Law In Opposition To Defendants' Motion For Summary Judgment AP-3-004 to 126.

Ms. Terry's existence prior to the day he was given his termination notice and told to report to her at a heritage JPMorgan building, not a heritage Chase building. As an "artificial person," defendant Chase, has many personalities including but not limited to its "legal-department-personality," its "litigation-prevention-program-personality," its "investment-bank-technology-organization-personality," its "human-resources-personality" and others. It is unclear which one of defendant Chase's personalities may have deliberately misled the Second Circuit on the facts of the longevity of Kong's behavior. What is clear is that as an "artificial person" defendant Chase is "artificially schizophrenic" which enables "plausible deniability" by the "legal-department-personality."

> The human resources job descriptions are irrelevant as well because the effective job roles of the three pre-existing LOPS team positions were unchanging. All that is relevant is that defendant Kong determined everything. There is no list of these "nebulous and allegedly new functions." The district court has tendentiously interpreted these nebulous unstated new functions as sufficiently significant even though absolutely no evidence of them being significant or even trivial has been presented by defense counsel. In effect, it is a new job role ultimately because only defendant Kong deems it so. It is the Emperor's new clothes approach to new job roles whereby the corporation, defendants in this case, give it a semantic alternative description to allow

managers to discriminate by claiming it to be a "new job role" even though its effectively the same naked old job role; it also has the added benefit of giving cover to human resources for not doing anything about the discrimination/retaliation perpetrated by the manager, in this case defendant Kong. Such tendentiously corporatist jurisprudence undermines anti-discrimination laws creates layer upon layer of false stare decisis that is in reality "saepenumero erratum"[2] and in effect allows corporations to "discriminate at will" under the disguise of reorganization (Appellant Brief Pg 20).

4. THE SECOND CIRCUIT HAS DEVELOPED AN INAPPROPRIATE AND POSSIBLY ILLEGAL HABIT OF ROBUST USE OF SUMMARY JUDGMENT TO CLEAR DOCKETS

Gallagher v. Delaney **Docket No. 97-7726 U.S.C.A., 2nd Cir. – 139 F.3d 338**

"The evidence, viewed in the light most favorable to the appellant, requires a trial. Creating a mosaic with the bits and pieces of available evidence, a reasonable juror might picture either a malign employer using his position to pressure a subordinate for sexual favors or a benign boss trying – however ineptly – to express concern for his secretary in a non-erotic manner that she mistakenly

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[2] Repeated Error.

> viewed as sexually aggressive. The jury could also find either retaliation for a complaint of sexual harassment or a sensible managerial decision to promptly separate a supervisor and an employee who were incompatible." [....] "Characterizing behavior as sexually harassing can only be accomplished in a specific context. [....] Is behavior deemed inappropriate by an etiquette savant sexual harassment? The answer often depends upon perceptions of the circumstances" [*Gallagher v. Delaney* No. 97-7726 U.S.C.A., 2nd Cir. – 139 F.3d 338].

So too characterizing behavior as "workplace bullying" can only be accomplished in a specific context. When do managerial acts become gratuitous performance maligning, sabotage, and workplace bullying? When does the manager's motive become a form of insidious discrimination, retaliation or intentional infliction of emotional distress? When does a moratorium of complaints by subordinates become indicative of a "climate of silence" condoned by the employer to impede appropriate liability? The answer often depends upon perceptions of the circumstances.

> "A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations. Such an effort, even were it successful, would produce questionable legal definitions for the workplace where recognition of employees' dignity might require standards higher than those of the street. [....] The purpose of Title VII is not to import into the workplace the

prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment. [....] The factual issues in this case cannot be effectively settled by a decision of an Article III judge on summary judgment. Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, perceptions, and implicit communications. *See, e.g., United States ex rel. Toth v. Quarles,* 350 U.S. 11, 18 (1955) ("Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions, and habits."); *United States v. Shonubi,* 895 F. Supp. 460, 482-88 (E.D.N.Y. 1995) (methods triers of fact employ in deciding cases), *rev'd on other grounds,* 103 F.3d 1085 (2d Cir. 1997)." [....] The dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases. *Compare Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) ("Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the

> manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis."), *and DiLaurenzio v. Atlantic Paratrans, Inc.,* 926 F. Supp. 310, 314 (E.D.N.Y. 1996) (determination of whether a workplace is hostile or not is "the sort of issue that is often not susceptible of summary resolution"), *with Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir.) ("salutary purposes of summary judgment...apply no less to discrimination cases than to commercial or other areas of litigation"), *cert. denied,* 474 U.S. 829 (1985). *See also* Judith Olans Brown, Stephen N. Subrin, and Phyllis Tropper Baumann, *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening The Judicial Dialogue,* 46 Emory L.J. 1487 (Fall 1997). [....] In this period of rapidly changing and conflicting views of appropriate gender relationships in the workplace, decisions by a jury in debatable cases are sound in policy and consonant with the Seventh Amendment. The facts of this case illustrate the sharp differences in inferences that can be supported, depending upon the trier's hypotheses. [*Gallagher v. Delaney* No. 97-7726 U.S.C.A., 2nd Cir. – 139 F.3d 338].

The trier in this case, Magistrate Dolinger, owned JPMorgan Chase Stock. We are clearly in a period of rapidly changing and conflicting views about the entire rubric called "workplace bullying." Behavior that in prior cases deemed legitimate management decisions can be in reality illegitimate and

abusive insidiously discriminatory, retaliatory or a form of IIED. As badly managed corporations learn to discriminate and harass more insidiously in response to current jurisprudence, so too should the standards evolve to counteract the insidious evolution of bad corporate behavior. Jurisprudential focus solely on blatant and overt acts enables and empowers insidious workplace bullying, harassment, and discrimination. The purpose of the Seventh Amendment is in part to promote the continuous evolution of jurisprudence as American society and culture continues to evolve and change. More importantly the natural law rooted Seventh Amendment Right to Trial by Jury, is, until repeal of the amendment, absolute. The Second Circuit has violated petitioner's Seventh Amendment right to trial by jury and interpreted the evidence in the most favorable light of the "moving party" instead of the "non-moving party" as required by law. *See also* affidavits of Dr. Michael Hall: "I would gladly pursue a class action suit against the U.S.C.A., U.S.S.D.N.Y. and Chief Justice Mukasey for illegally shielding Hon. Judge George B. Daniels from complaints of misconduct. It is obvious, from the actions outlined, improper activity has occurred and Judge Daniels has intentionally disregarded vital evidence and by inappropriately granting summary judgment dismissing my case." (App. 134-138).

5. MUCH ANALYSIS OF THE COURTS INCLUDING TITLE VII ANALYSIS IS TENDENTIOUSLY CORPORATIST AND PERNICIOUSLY ANTI-NATURAL-PERSON BECAUSE IT USES THE CONSTRUCT "ARTIFICIAL PERSON" BUT NOT "ARTIFICIAL STATE"

CORPORATE PERSONHOOD AND ECONOMIC DEMOCRACY

> The affirmation of corporate personhood is then the synthesis of legal positivism and natural rights' theory [....] Positivist determinism and natural rights are intrinsically incompatible with a political discourse over market and corporations. [....] "natural law represents those forms of objectivist morality that rest on a style of teleological reasoning about goodness of nature which are alien to the more utilitarian tradition from which ethical positivism emerges" (Campbell, 1999). The contradiction is then solved into the market sphere through the market mechanism. [....] The persistence of the pretended separation between private and public sphere denies the public role acquired by corporations. The public sphere is thus 'privatized', in the sense that it is occupied by a market-like discourse. Habermas defines this process as "refeudalization." [....] Therefore, if from one side they entertain commercial relations pertaining to a private domain, from the other business corporations work somehow like States, intensively shaping the public sphere. [....] Corporate personhood is inscribed in the neutral concept of democracy

> implied by the politics/trade and public/private separations, mixed with a positivist withdrawal from the judgment over the scientific laws of trade: as a consequence, corporate personhood fits a conceptual world entailing the abandon of political discourse [....] A political discourse over corporations' activities instead would imply the introduction of democratic accountability of the whole organism, enlarging the multiple stakeholders to workers and local communities (AP-2-285 Corporate Personhood and Economic Democracy. By Luigi Cerri http://www.econ-pol.unisi.it/econdem/Documenti/Luigi%20Cerri.doc).

Therefore for the purpose of at least Title VII analysis the alternative perspective to "artificial person" which is "artificial state" ought to be created by this court extending through appropriate use of constitutional operationalism the Bill Of Rights to cover today's "East India Companies" as the "artificial states" that they in reality function as. [*Louis K. Liggett Co. et al. v. Lee, Comptroller et al.*, 288 U.S. 517 (1933) (AP-3-332) Hon. Justice Brandeis Dissenting, The Hon. Justice Hugo Lafayette Black Dissenting, *CT General Life Insurance Company v. Johnson*, 303 U.S. 77 (1938) (AP-3-373 to 375), *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), Justice Black and Justice Douglas Dissenting, "Corporate Personhood And Economic Democracy" "http://www.econ-pol.unisi.it/econdem/Documenti/Luigi%20Cerri.doc"]. This rebalancing is necessary to protect the liberty and rights of natural-person-employees from the

"artificial states" created through articles of incorporation by real states incorporated under the Fourteenth Amendment, to protect against *"refeudalized corporate peasanthood,"* to alleviate inhibitions of corporate social responsibility permeating existing jurisprudence, to alleviate tendentiously corporatist perniciously anti-employee bias within current Title VII Analysis, and to start taking the jurisprudential steps necessary to save the planet from global warming and force corporate social responsibility above and beyond the corporate tangible bottom line. Appropriately extended via constitutional operationalism the First Amendment would apply thusly. "Corporate Leadership [artificial state leadership, school leadership] shall make no corporate policy or procedure respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech (including natural speech, race, gender, physical handicap, origin, Ninth Amendment Stuff), or of the press; or the right of the employees [or students etc.] peaceably to assemble, and to petition the corporate leadership for redress of grievances." The underlying premise of our Constitution is that individuals in power will at times behave badly therefore we need the Constitution to keep them in line. Correspondingly with an "artificial state" individuals in corporate power will at times behave badly therefore we need the Constitution to keep them in line as well. [*See* Appellant Reply Brief Pg 12-14].

When defendant Chase is viewed as an "artificial state" the analysis is greatly simplified. The repeated

denial of petitioner's multiple request for independent review where defendant Kong did not take part becomes a repeated violation by defendant Chase of petitioner's First Amendment "status blind" right to petition for redress of grievances for Kong's abuse. The natural law rooted United States Constitution and the natural law rooted "Bill of Rights" were quite simply not meant to be abandoned in order to make a living, nor were they written to facilitate international corporate refeudalization.

6. THIS CASE PRESENTS ISSUES OF FUNDAMENTAL NATIONAL IMPORTANCE

Correcting flaws in discrimination, harassment, hostile work environment, retaliation, and IIED analysis is of national importance for all natural person Americans. The evidence ought to be sufficient to preclude summary judgment under NYCHRL. The combination of petitioner's *prima facie* case of discrimination and his psychiatric injury caused by protracted exposure to Kong's workplace bullying should be sufficient to preclude summary judgment on his IIED claim. Viewing corporations as "artificial states" should acknowledge pre-existing constitutional "status blind" protection from employer abuse implicit in the First, Ninth, and Fourteenth Amendments.

7. THIS CASE PRESENTS ISSUES OF WORLD IMPORTANCE

Correcting the unconstitutional imbalance created by the improperly created anti-natural-law construct "artificial person" (*Santa Clara County v. Southern Pacific Railroad Company,* 118 U.S. 394 (1886), Justice Black Dissenting, *CT General Life Insurance Company v. Johnson*, 303 U.S. 77 (1938), Justice Black and Justice Douglas Dissenting, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949)), which was born out of "19th century laissez-faire corporate libertarianism" ideology, vis a vis the natural-law-compatible construct of "artificial state" is necessary if we are to successfully save the planet from global warming. The Supreme Court can ill afford to delay the question of the constitutionality of "artificial person" vis a vis "artificial state," "anti-natural-law constitutional operationalism" vis a vis "natural-law-compatible constitutional operationalism."

> The abolition of corporate personhood is part of the abolition of slavery. It is deeply connected to our need to save the earth from environmental destruction. This is not an optional campaign. Hard as it might be, it is better to fight now than in 20 years when corporations are even more entrenched and the average person has sunk even deeper into our modern style of slavery." ("The Santa Clara Blues: Corporate Personhood versus Democracy" AP-3-441 to 470, *see also*

Model Brief of Amici Curiae to Overturn Corporate Personhood. AP-3-379 to 440).

CONCLUSION

For all the foregoing reasons, petitioner Christian E. Williams respectfully requests the Court to grant his petition for writ of certiorari.

Respectfully submitted,

CHRISTIAN E. WILLIAMS
268 Barrow Street, Apt. Grdn
Jersey City, NJ 07302-4026
Tel: 201-324-0869
Fax: 775-242-4940
Email: xtianNYC@gmail.com

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE

DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of April, two thousand eight.

PRESENT:

HON. BARRINGTON D. PARKER
HON. DEBRA A. LIVINGSTON,
Circuit Judges,

HON. JANET C. HALL,[1]
District Judge.

Christian Williams,
Plaintiff-Appellant,

-v.-

J.P. Morgan Chase & Co., Raymond Kong, John J. Farrell, John R. Vega, Andrew Holly, Steve Rutter, Peter Bibb, Gary Ford, Joe Warzenski, Gayle Prescod, Anthony Shefferd, Mary C. Keller, Shabeena Gilani,
Defendant-Appellees.

SUMMARY ORDER
06-1324-cv

(Filed Apr. 3, 2008)

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[1] The Honorable Janet C. Hall, United States District Judge for the District of Connecticut, sitting by designation.

FOR APPELLANT: Christian Erik Williams, Jersey City, New Jersey, *pro se*

FOR APPELLEES: Frederic L. Lieberman (Stacey L, Blecher, of counsel), JPMorgan Chase Legal Department, New York, New York.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Appellant Christian Erik Williams, *pro se*, appeals from the December 16, 2005 order of the United States District Court of the Southern District of New York (Daniels, *J.*) granting defendants-appellees' motion for summary judgment. Williams asserts violations of New York City and State anti-discrimination law, intentional and negligent infliction of emotional distress, and libel, slander and defamation of character. We assume the parties' familiarity with the underlying facts and procedural history of the case.

We review an order granting summary judgment *de novo* and ask whether the District Court properly concluded that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). In determining whether there are genuine issues of material fact, we are "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment

is sought." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003) (internal quotations omitted).

On appeal, Williams argues that the district court erred in allowing his counsel to withdraw from the case, rather than removing counsel for cause. Williams claims that the District Court's decision impaired his ability to obtain new counsel. However the record on appeal demonstrates that Williams joined the motion to withdraw and fails to show that he was prejudiced by his counsel's withdrawal. Accordingly, we do not find that the district court acted improperly.

Williams also claims that a letter from appellee John R. Vega to Williams's trial counsel, written while counsel was still representing Williams, undermined the relationship between Williams and his attorney. We disagree. Williams offers no evidence to support his assertion and abandons the argument after a one-sentence claim in his brief. Further, the record establishes that Vega wrote the letter in response to Williams' post-termination complaints about his treatment at J.P. Morgan and its predecessor. We find that Williams' claim lacks merit.

With respect to Williams' remaining claims, we have reviewed the magistrate judge's report and recommendation, and the District Court's order adopting the report, and find no infirmity in the judgment.

For the foregoing reasons, we AFFIRM the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
By: /s/ Franklin [Illegible]

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

0CHRISTIAN WILLIAMS,

Plaintiff,

-against-

J.P. MORGAN CHASE BANK, et.al.,

Defendants.

---------- X

02 **CIVIL** 4250 (GBD)

JUDGMENT

(Filed Dec. 19, 2005)

Defendants having moved for summary judgment pursuant to Fed. R. Civ. P. 56, and the matter having come before the Honorable George B Daniels, United States District Judge, and the Court, on December 16, 2005, having rendered its Order granting defendants' motion for summary judgment and dismissing the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated December 16, 2005, defendants' motion for summary judgment is granted and the complaint is dismissed; accordingly, the case is closed.

Dated: New York, New York
December 19, 2005

J. MICHAEL McMAHON
Clerk of Court

BY: /s/ [Illegible]
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

CHRISTIAN WILLIAMS

Plaintiff,

-against-

J.P. MORGAN CHASE BANK, et al.,

Defendants.

ORDER
02 CV 4250 (GBD)

---------- x

GEORGE B. DANIELS, District Judge:

Pro se plaintiff Christian Williams sued his former employer, JPMorgan Chase Bank, his former supervisor, and other bank employees, alleging that the defendants discriminated against him and eventually terminated his employment because of his sexual orientation and because of the defendants' mistaken perception that plaintiff was HIV-positive and therefore disabled. Plaintiff also claims that the defendants subjected him to a hostile work environment and retaliated against him for complaining about his supervisor's treatment of him to upper-level management and the Human Resources department. In addition to the discrimination claims, plaintiff brings the common law claims of intentional infliction of emotional distress, libel, slander, and defamation of character. Unfortunately, plaintiff

suffers from serious psychiatric problems. He believes that defendants' psychological abuse caused him acute disabling psychiatric injury.

The defendants moved for summary judgment, arguing that plaintiff's claims fail as a matter of law because he cannot establish that he was subjected to disparate treatment or retaliation because of his sexual orientation or perceived disability. They claim that a post-merger reorganization and corresponding reduction in labor force caused his termination. They argue that plaintiff has provided no evidence that defendants' stated reasons for their adverse actions are a pretext for sexual-orientation discrimination, perceived-disability discrimination, or retaliation.

This action was referred to Magistrate Judge Michael H. Dolinger for a Report and Recommendation ("Report") on defendants' motion for summary judgment. Magistrate Judge Dolinger issued a thorough and exhaustive seventy-four (74) page Report on August 19, 2005 in which he recommended that defendant's motion for summary judgment be granted. The Report concludes that plaintiff's claims of sexual orientation discrimination fail because they are unsupported by evidence that defendants' non-discriminatory reason for plaintiff's termination was a pretext. The Report also determined that plaintiff's claims of unlawful discrimination based on a perceived disability fail because plaintiff was not perceived as "disabled" within the meaning of the Americans with Disabilities Act, and because there

was insufficient evidence that an "adverse employment action" occurred because of that perception.

Plaintiff's claims of hostile work environment fail because they were unsupported by any evidence of discriminatory animus. Plaintiff's claims of unlawful retaliation were also found to be unsupported by evidence that defendants were aware of plaintiff's engagement in a protected activity, and similarly unsupported by evidence that defendants engaged in any pre- or post-termination retaliation. Plaintiff's claims of intentional infliction of emotional distress were found lacking substance because the acts complained of did not rise to the level of "extreme and outrageous conduct," and because those acts complained of occurred outside of the one-year statute of limitations. Plaintiff's claims of negligent infliction of emotional distress fail because plaintiff's physical safety was not found to have been unreasonably endangered by the defendants' negligence, and because the plaintiff's employer did not owe plaintiff a special duty of care. Finally, plaintiff's claims of defamation fail because the claims were time-barred by a one-year statute of limitations, and because each claim was unsupportable on the facts.

In his Report, Magistrate Judge Dolinger advised the parties that failure to file timely objections to the Report would constitute a waiver of those objections. On August 29, 2005, plaintiff requested an additional three months to November 29, 2005 to file objections to the report. This Court granted plaintiff's requested extension of time. On November 22, 2005, plaintiff

filed a thirty-one page objection to Magistrate Judge Dolinger's detailed Report. The defendants indicated by letter to this Court that they do not object to the Report. They request that this Court adopt the report in its entirety.

In his objections, plaintiff argues that "[g]enuine issues of material fact as to whether [plaintiff's supervisor's] conduct of workplace bullying tactics with little or no provocation which caused plaintiff's disabling acute psychiatric injury was motivated by plaintiff's sexual orientation or perceived HIV status preclude summary judgment in favor of defendants." Plaintiff contends that Magistrate Judge Dolinger did not appropriately or correctly analyze the evidence presented because he does not understand "Workplace Bullying/Mobbing" as a theory of adverse employment action. Plaintiff asserts that his supervisor's conduct of employing workplace bullying tactics without justification itself amounted to adverse employment action sufficient to state a claim of unlawful discrimination. Plaintiff asserts that Magistrate Judge Dolinger ignored the evidence creating a genuine issue of material fact that plaintiff provided rebutting the Report's conclusion that the only adverse employment action in this case was plaintiff s termination of employment. Plaintiff argues that Magistrate Judge Dolinger ignored the relationship between defendant's behavior and plaintiffs acute psychiatric injury. Plaintiff also asserts that the Court must conclude that his supervisor's behavior was sufficiently severe to rise to the level of an

adverse employment action because the psychotherapy evidence that plaintiff submitted as proof of his psychiatric injury was unchallenged. In addition, plaintiff claims that "disabling acute psychiatric injury" is not a natural and unavoidable consequence arising out of, and in the course of employment at a bank. Plaintiff further argues that since his disabling acute psychiatric injury was caused by intentional workplace bullying acts by his supervisor, defendants are liable under the common law claims of intentional infliction of emotional distress and negligent infliction of emotional distress.

With respect to both his intentional infliction of emotional distress claim and his discrimination claim, plaintiff also argues that Magistrate Judge Dolinger should have formulated new legal guidelines and rules because there is no scientific support for the current jurisprudence. Plaintiffs [sic] asserts that this Court should be compelled to create a "new and corrected standard test that reflects the currently evolved knowledge of harassment, hostile work environment, organizational behavior, workplace bullying, and the typology of organizational response to allegations of 'workplace bullying.'" Under this test, the plaintiff asserts that the nexus between his psychological injury and defendants' conduct should be sufficient to raise triable issues of fact relating to defendants' liability.

When timely objection has been made to a magistrate judge's report, the district judge is required to "make a *de novo* determination . . . of any portion of

the magistrate's disposition to which specific written objection has been made. . . ." Fed. R. Civ. P. 72(b); *see also* 28 U.S.C. § 636(b)(1)(C). The district judge is not required to conduct a *de novo* hearing on the matter. *United States v. Raddatz,* 447 U.S. 667, 676 (1980). "It is sufficient that the district court 'arrive at its own, independent conclusion about those portions of the magistrate's report to which objection is made. . . .'" *Nelson v. Smith,* 618 F. Supp. 1186, 1189-90 (S.D.N.Y. 1985) (quoting *Hernandez v. Estelle,* 711 F.2d 619, 620 (5th Cir. 1983)). Since plaintiff is proceeding *pro se*, his objections, as well as his other pleadings, are to be liberally construed and interpreted to raise the strongest argument they suggest. *Hains v. Kerner,* 404 U.S. 519, 520-21 (1972); *McPherson v. Coombe,* 174 F.3d 276, 280 (2d. Cir. 1999) (quoting *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d. Cir. 1994)).

The district court is obligated to "exercise . . . sound judicial discretion with respect to whether reliance should be placed on [the magistrate judge's] findings." *American Express Int'l Banking Corp. v. Sabet,* 512 F.Supp. 472, 473 (S.D.N.Y.1981), *aff'd,* 697 F.2d 287 (2d Cir. 1982). The district judge may then accept, reject, or modify, in whole or in part, the findings or recommendations of the magistrate judge, receive further evidence, or recommit the matter to the magistrate judge with additional instructions. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C).

The referring district judge may accept the portions of the magistrate judge's report and recommendation to which no specific written objections are made provided there is no clear error on the face of the record. *Nelson v. Smith,* 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985); *see also Heisler v. Kralik,* 981 F. Supp. 830, 835 (S.D.N.Y. 1997), *aff'd* 164 F.3d 618 (2d Cir. 1998). With respect to those portions of the Report to which there were no objections, the Court finds that the record is not facially erroneous. Accordingly, the Court adopts those portions of the Report to which no objection has been filed.

With respect to the portions of the Report to which plaintiff objects, the Court has examined plaintiff's objections and finds them to be without merit. This Court, upon a *de novo* review, concludes that Magistrate Judge Dolinger's ultimate findings are correct. Accordingly, the Court adopts the Report in its entirety. Defendants' motion for summary judgment is granted.

Because plaintiff did not produce direct evidence of sexual-orientation discrimination, his claim is evaluated under the burden-shifting procedure set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Viewing the evidence in the light most favorable to the plaintiff, he has minimally made a prima facie showing of unlawful discrimination. Although many of plaintiff's complaints regarding his treatment at work do not amount to "materially adverse changes" in his employment rising to the level of an adverse employment action, the termination of

plaintiff's employment is such a materially adverse change. Since plaintiff has proffered some evidence that could be interpreted as anti-gay bias, he presented a prima facie case of unlawful discrimination. *See id.*[1]

The defendants have, however, articulated a legitimate, non-discriminatory reason for terminating plaintiff's employment. According to defendants, plaintiff was terminated because of a restructuring and reduction in workforce that followed in the wake of the employer's merger with J.P. Morgan Co. There is insufficient evidence that defendants' proffered reason for plaintiff's termination is false, and that discrimination was the reason for the defendants' actions. Plaintiff provides no facts to support the conclusion that his termination was motivated, even in part, by animus towards his sexual orientation. *See Taylor v. Polygram Records*, 1999 WL 124456, *10 (S.D.N.Y. May 8, 1999). Plaintiff's repeated conclusory assertion that the problems he suffered on the job, which led to his eventual termination, and alleged psychiatric injury were attributable to discriminatory animus is insufficient to support his claim. The record is bereft of evidence that plaintiff's

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[1] The Report conceded that plaintiff "has submitted the barest slivers of evidence – two comments that may possibly indicate an anti-gay bias, his statement to [a member of the Human Resources department] that anti-gay bias was a concern of his with regard to [his supervisor's] treatment of him, and some post-termination references to [his supervisors] possible anti-gay bias. . . ." Report at 43.

sexual orientation was the motivating cause for any adverse employment action.

Plaintiff's claim that defendants discriminated against him because of a perceived disability, the erroneous perception that he was HIV-positive, similarly fails. Plaintiff cannot satisfy two elements of a prima facie case. He was not perceived to have a "disability" within the meaning of the ADA, and he suffered no adverse employment action because of a misperceived disability. Plaintiff was not considered to be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs" as disabled is defined by the ADA. 29 C.F.R. § 1630.2(j)(3)(i). Plaintiff also did not cite any statements or conduct by any of the defendants to support the claim that the defendants took any action whatsoever because of a perception of a disability.

Plaintiff's claim of hostile work environment harassment based on the allegation that plaintiff's supervisor created and maintained a "hostile harassment filled psychologically abusive work environment," and that "he [was] allowed to do so" by plaintiff's employer, also fails as a matter of law. Plaintiff did not present evidence that the defendants created a hostile work environment during plaintiff's employment based on forbidden discriminatory animus. All of the proffered evidence appears to reflect hostility rooted in the personality conflict between plaintiff and plaintiff's supervisor. The record also evidences that plaintiff's supervisor was antagonistic to most of those he supervised, which

eventually resulted in a warning being issued. This lack of evidence of illegal animus is fatal to plaintiff's hostile work environment claim. *See Petrosino v. Bell Atlantic*, 385 F.3d 221, 223 (2d Cir. 2004).

Plaintiff similarly has not made a prima facie claim of retaliation. Plaintiff alleged that his supervisor retaliated against him for "whistle blowing" the supervisor's actions to personnel and higher management. Plaintiff also alleged that his supervisor engaged in "post-termination retaliation and prevented Plaintiff from obtaining re-employment on account of plaintiff's sexual orientation and perceived disability." However, while he was an employee, plaintiff never specifically complained to any defendant that he was being treated in a discriminatory manner by his supervisor because of his sexual orientation or a misperception that he was HIV-positive. Plaintiff similarly provides no factual support for his claim that his supervisor engaged in any pre- or post-termination retaliation.

Plaintiff argues that this Court should formulate a "new and corrected standard test that reflects the currently evolved knowledge of harassment, hostile work environment, organizational behavior, workplace bullying, and the typology of organizational response to allegations of 'workplace bullying.'" He contends that under his "new and corrected standard test," the evidence he has proffered is sufficient to withstand defendants' motion for summary judgment. This Court, however, cannot discard our Circuit's

jurisprudence relating to adverse employment actions and hostile work environment claims.

Plaintiff's claim of intentional infliction of emotional distress cannot survive summary judgment. Plaintiff asserts that his supervisor's "hostile verbal and hostile nonverbal communication," his "interfering actions" and "desire to control rather than manage the Plaintiff," and the range of behaviors that plaintiff collected under the rubric "Workplace Bullying" constituted intentional infliction of emotional distress. The evidence plaintiff presented to support his claim that defendants intentionally caused him emotional distress does not rise to the level of extreme and outrageous conduct necessary to maintain such a claim. *See Daniels v. Health Ins. Plan of Greater New York*, 2005 WL 1138492, *3 (S.D.N.Y. May 12, 2005). Moreover, the statements about which plaintiff complains each fall outside the one year-statute of limitations for intentional infliction of emotional distress claims. *See Greene v. Trustees of Columbia Univ.*, 234 F. Supp.2d 368, 382 (S.D.N.Y. 2002).

Plaintiff's claims of negligent infliction of emotional distress under either a bystander theory or special duty theory also fail. Plaintiff asserts that the bank, and the individual defendants other than his supervisor, inflicted "emotional duress" on him by acting as aider and abettor, jointly and severally by ignoring plaintiff's complaints, the complaints of others, their own existing policies and procedures. Plaintiff argues they thereby enabled and sanctioned his supervisor's "previously listed psychologically

abusive workplace bullying tactics." Plaintiff's negligent infliction of emotional distress claims cannot succeed in the absence of evidence that his physical safety was unreasonably endangered by the defendants' negligence or that the bank owed him a special duty. *See Druschke v. Banana Republic, Inc.*, 359 F. Supp.2d 308, 315 (S.D.N.Y. 2005). He has not presented any such evidence.

Moreover, because plaintiff alleges psychological injuries, any allegedly negligent actions by his employer that might cause emotional distress are governed by New York's laws of worker's compensation. If plaintiff's claim were meritorious, he could properly bring suit under that statute, and thus, he may not recover in this lawsuit. *See* N.Y. Work. Comp. Law § 11 (2005).

Plaintiff's defamation claims are also time-barred and wholly unsupported by evidence sufficient to maintain such a claim. Plaintiff asserts a libel claim based on a statement in a January 2002 letter from a bank vice-president to plaintiffs then-attorney that "there is no evidence of discriminatory animus. Any claims to the contrary are false." According to plaintiff, the letter's writer effectively called him a liar in this writing. In addition, plaintiff contends that his supervisor slandered him to at least one interviewer for a transfer position around May-June 2000. Both of these claims are time-barred under New York's one-year statute of limitations. *See Solas v. Jones,* 2005 WL 525444, *2 (S.D.N.Y. Mar. 7, 2005). Moreover, the 2002 letter was not "published" for the

purpose of a libel claim because it was written in direct response to a letter from plaintiff's attorney. *Id.*[2] In addition, plaintiff's supervisor is protected by a qualified privilege, as the supervisor's statements were made upon a subject in which he had a duty to speak, and the communication was made to another person with a corresponding interest. Because plaintiff does not offer any evidence that plaintiff's supervisor was motivated by malice in making his statement, the defamation claim fails. *See Hawkins v. City of New York*, 2005 WL 1861855, *19 (S.D.N.Y. Aug. 4, 2005).

Accordingly, Defendants' motion for summary judgment is granted. This case is dismissed.

Dated: New York, New York
December 16, 2005

SO ORDERED:

/s/ George B. Daniels
GEORGE B. DANIELS
United States
District Judge

[2] Plaintiff's attorney was relieved of her representation upon both plaintiff's request and the attorney's separate application after a violent altercation in the attorney's office.

APPENDIX D

S.D.N.Y.
02-cv-4250
Daniels, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 24th day of February two thousand and six,

Present:

Hon. Pierre N. Leval,
Hon. Robert A. Katzmann,
Circuit Judges,
Hon. Janet Bond Arterton,
District Judge.*

In re Christian Williams,	05-0438-op
Petitioner.	(Filed Feb. 24, 2006)

Petitioner, *pro se*, has filed a petition for a writ of mandamus. Upon due consideration, it is ORDERED

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* The Honorable Janet Bond Arterton, of the United States District Court for the District of Connecticut, sitting by designation.

that the petition for a writ of mandamus is DENIED. Petitioner has not demonstrated that the district court usurped its power, *see In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987), or that he lacks an alternative avenue of relief, *see Mallard v. United States Dist. Court*, 490 U.S. 296, 309 (1989).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

CHRISTIAN WILLIAMS,

Plaintiff,

-against-

J. P. MORGAN CHASE & CO., et al.,

Defendants.

---------- x

02 Civ. 4250 (GBD)(MHD)

ORDER

GEORGE B. DANIELS, DISTRICT JUDGE:

Plaintiff's request for additional time, until November 29, 2005, to file objections to Magistrate Judge Michael H. Dolinger's August 19, 2005 Report and Recommendation is granted.

Plaintiff's request that an oral argument be scheduled is denied.

Dated: New York, New York
August 29, 2005

SO ORDERED:

/s/ George B. Daniels
GEORGE B. DANIELS
United States
District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTIAN WILLIAMS	:	02 Civ. 4250 (GBD)
Plaintiffs,	:	ORDER
-against-	:	
J.P. MORGAN CHASE BANK, et. al.	:	
Defendants.	:	

GEORGE B. DANIELS, District Judge:

BACKGROUND

This action, originally filed in New York State Supreme Court, was removed to this court on diversity grounds by defendants J.P. Morgan Chase Bank and Raymond Kong on June 6, 2002. On December 11, 2002, plaintiff, proceeding *pro se* after this Court granted his attorney's application to be relieved, sought leave to amend his complaint. By letter received on December 31, 2002, defendants notified the Court that it did not object to plaintiff's motion for leave to amend, and in a status conference held before this Court on January 23, 2003, leave to amend plaintiff's complaint was granted.

Plaintiff subsequently filed and served his amended complaint, which included claims under the

Occupation Safety and Health Act ("OSHA"), 29 U.S.C. § 651 *et seq.*, alleging that defendants failed to create a psychologically safe working environment. (Pl.'s Am. Compl. at 33.) Plaintiff also included claims for libel, slander and defamation of character, and a claim for "Generalized Illegal Hostile Work Environment" derived from plaintiff's interpretation of certain OSHA provisions. *Id.* at 42.[1] In addition, plaintiff included eleven additional defendants, all employees of Defendant J.P. Morgan Chase Bank.

On February 24, 2003, defendants moved to dismiss plaintiff's amended complaint and remand the case back to state court. Defendants argue that because OSHA does not authorize a private right of action, plaintiff's OSHA-based claims should be dismissed for failure to state a legally sufficient claim for relief. In addition, defendants argue that the remainder of the amended complaint should be dismissed for lack of subject matter jurisdiction because three of the added defendants share the same residence as plaintiff and therefore destroy complete diversity.

Plaintiff recognized the deficiencies in his complaint and, on February 24, 2003, cross-moved for

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[1] Plaintiff's original complaint asserted state law claims of discrimination on the basis of perceived disability and sexual orientation, in violation of Local Laws of the City of New York Administrative Coe § 8-107 *et seq.* and § 8-502, and New York State Executive Law § 209 *et seq.* Plaintiff reasserted these claims in his amended complaint.

leave to file a second amended complaint. Plaintiff's proposed second amended complaint removes all OSHA claims and drops the defendants who share plaintiff's residence, thereby restoring complete diversity.

On March 9, 2003, Plaintiff informed this Court that as a substitute to pursuing his OSHA-based claims in federal court, plaintiff had filed a complaint with the Occupational Safety and Health Administration (the "Administration"). Plaintiff further informed the Court that the Administration had decided not to conduct an inspection of defendant J.P. Morgan Chase Bank. The Administration explained to plaintiff that his complaint "is not covered under any applicable OSHA standards," and therefore did not fall within the Administration's jurisdiction. (Letter from Richard Mendelson, OSHA Area Director to Williams of 2/28/03). Plaintiff was informed of his right to an informal review by the Regional Administrator. However, plaintiff appealed directly to the Secretary of Labor, requesting, in a letter dated March 8, 2003, that the Secretary grant plaintiff permission to proceed with his OSHA claims in an "authorized private action" in this Court.

Plaintiff thereafter requested that this Court refrain from ruling on the outstanding motions pending a decision from the Secretary of Labor. Plaintiff believes that if the Secretary grants his request for an authorized private action, then plaintiff's OSHA claims will create a federal question and thus he may proceed with his first amended complaint. In the

alternative, plaintiff intends to proceed with his motion for leave to file a second amended complaint.

DISCUSSION

It is well settled that "[u]nder OSHA, employees do not have a private right of action." *Donovan v. Occupational Safety and Health Review Comm'n*, 713 F.2d 918, 926 (2d Cir. 1983). "[E]mployees have a limited role in the enforcement of the Act." *Id.* The specific rights granted to employees by OSHA include, inter alia, the right to participate in the rulemaking process, 29 U.S.C. § 655(b)(2), (3), the right to request – as plaintiff did in this case – that the Secretary of Labor investigate an employer for suspected violations of safety regulations. 29 U.S.C. § 657(f)(1), and the right to submit written information to the Secretary of Labor, 29 U.S.C. § 657(f)(2).

Besides these specific rights, "the public rights created by [OSHA] are to be protected by the Secretary . . . and the enforcement of the Act is the sole responsibility of the Secretary." *Donovan*, 713 F.2d at 927. "Only [the Secretary] has the authority to determine if a citation should be issued to an employer for hazardous or unsafe working conditions . . . and only [the Secretary] may prosecute a citation before the [Occupational Safety and Health Review Commission." *Id.* OSHA does not provide the Secretary with any power to delegate this authority to employees. Unlike other acts of Congress, such as Title VII, no provision is made in OSHA for the conferral of

"right to sue" authority to private plaintiffs. *Compare* 42 U.S.C. § 2000e-5 (enforcement provisions for Title VII *with* 29 U.S.C. § 659 (enforcement provisions for OSHA).

Plaintiff's request that the Secretary of Labor grant him permission to pursue an "authorized private action" is beyond the authority provided by OSHA. Therefore, plaintiff's application to this Court to stay any decision on the outstanding motions to await a response by the Secretary is denied.

Plaintiff otherwise seeks to file a second amended complaint so as to remove his OSHA-related claims and drop those defendants that have destroyed diversity. Leave to amend pleadings "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). It should be denied only in limited circumstances, such as undue delay, bad faith or futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The liberal standard for granting leave to amend is especially appropriate in this case, in light of plaintiff's current *pro se* status. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (noting that a complaint drafted by a *pro se* plaintiff, "however inartfully pleaded," must be held to a "less stringent standard" then pleadings drafted by an attorney); *Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir. 2000) ("[C]ourts must construe *pro se* pleadings broadly, and interpret them 'to raise the strongest arguments that they suggest.'") (quoting *Burgos v. Hopkins* 14 F.3d 787, 790 (2d Cir. 1994)).

The Court finds no undue delay, bad faith or any possible prejudice to the defendants by plaintiff's request to file a second amended complaint. Plaintiff's amendments are certainly not futile, especially since such amendments would allow *pro se* plaintiff to remain in federal court and avoid the costs and time involved in returning to state court. In light of the fact that defendants J.P. Morgan Chase Bank and Raymond Kong were the parties who removed this action to this Court in the first place, it seems especially appropriate to allow this legal dispute to remain here. Plaintiff's motion for leave to file a second amended complaint is therefore granted, and he is instructed to file his second amended complaint and serve the defendants pursuant to Rule 4 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. Rule 4.

Because plaintiff's second amended complaint would cure the deficiencies pointed out by defendants, defendants' motion to dismiss and remand is therefore denied as moot.

Dated: New York, New York
March 14, 2002

SO ORDERED:

/s/ George B. Daniels
GEORGE B. DANIELS
United States
District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTIAN WILLIAMS Plaintiffs, -against- J.P. MORGAN CHASE & CO. and RAYMOND KONG, Defendants.	:	02 Civ. 4250 (GBD) ORDER

GEORGE B. DANIELS, District Judge:

Plaintiff's counsel having moved to withdraw as counsel and plaintiff having cross-moved to have his counsel removed,

IT IS HEREBY ORDERED that counsel is relieved and plaintiff is granted permission to proceed *pro se* in the instant litigation.

Dated: New York, New York
October 11, 2002

SO ORDERED:

/s/ George B. Daniels
GEORGE B. DANIELS
United States District Judge

APPENDIX H

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR
Christian E Williams (Claimant)	Period of Disability and Disability Insurance Benefits
(Wage Earner)	XXX-XX-XXXX (Social Security Number)

INTRODUCTION

On October 15, 2002, the claimant filed applications for a period of disability, disability insurance benefits, and supplemental security income payments, alleging an inability to work effective June 28, 2001 due to an acute post-traumatic stress disorder and a prolonged duress stress disorder. The claims were denied upon the initial level of administrative review, but allowed upon reconsideration with an adverse established disability onset date of July 16, 2002. The claimant submitted a request for hearing on February 23, 2004 appealing the issue of the adverse onset date. Although his request was not submitted within the requisite 60-day appeal period, good cause for late filing has been established (Exhibits 7B, 8B). Because the previously established onset date is prior to the Title XVI application date, there is no potential

additional supplemental security income eligibility at issue. Hence, this adjudication pertains solely to the claimant's Title II claim for a period of disability and disability insurance benefits.

Following issuance of proper notice, a hearing in this matter was held before the undersigned Administrative Law Judge on March 15, 2005 in Newark, New Jersey. Although the claimant had been duly apprised of his right to obtain legal representation, he elected to forego said right, and he proceeded with the hearing without a representative. After the hearing, the evidentiary record was held open to allow the claimant an opportunity to submit additional evidence regarding his receipt of state unemployment insurance benefits following his alleged onset date, however, no further submissions were received.

ISSUES

The issue to be decided is whether the claimant was disabled for purposes of entitlement to a period of disability and disability insurance benefits under sections 216(i) and 223 of the Social Security Act, as amended ("the Act"), at any time between June 28, 2001 and July 15, 2002. The specific issue is whether he was under a disability, which is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

CONCLUSION

After careful consideration of the evidence, it is concluded that the claimant has been under a disability within the meaning of the Act and pertinent regulations since January 28, 2002, but not prior thereto, for the reasons discussed below.

EVALUATION OF THE EVIDENCE

The claimant, born on xxxx xx, xxxx, is a 41-year-old individual with a college education and past relevant work as a senior engineering officer, a senior systems analyst, and a staff consultant. He meets the insured status requirements of Title II of the Act at all times relevant herein.

Review of the claimant's earnings record reflects wages of over $94,000.00 for the calendar years 2001 and 2002 (Exhibit 2D). However, it has been ascertained that remuneration obtained after June, 2001 is associated with a company severance package. Hence, it is concluded that the claimant has not engaged in substantial gainful activity since the alleged onset date of June 28, 2001.

The medical evidence of record indicates that the claimant came under the treatment of psychiatrist Henry Beaulieu, M.D., on July 16, 2002 (Exhibit 3F). He was diagnosed with acute post-traumatic stress disorder, as characterized by irritability, anxiety flashbacks and nightmares. He was described and manifesting a low frustration/tolerance level, with a

poor concentration capacity and diminished reasoning ability. His treatment involved weekly psychotherapy sessions, in addition to psychotropic medications, including Geodon, Klonopin and Paxil. In October, 2002, Dr. Beaulieu indicated that the claimant was incapable of handling any degree of stress, and he should refrain from all work activity for at least a five-month period (Exhibit 2F).

In August, 2002, Angela Torres-Esteves, R.N., noted that she had known the claimant since 1996, and in her opinion, the claimant was suffering from a post-traumatic stress disorder secondary to workplace harassment and discrimination (Exhibit 1F). His condition was mentioned as including impaired memory, panic attacks, sleep disturbances, hypersensitivity, isolation, and exaggerated startle responses. It was specified that the claimant was unable to work because of chronic physical fatigue in conjunction with mental exhaustion.

In February, 2003, the claimant underwent a consultative mental status evaluation conducted by Dr. Joseph Buceta (Exhibit 4F). He was described as being cooperative with the interview, but also secretive and not forthcoming. It was noted that he made good eye-contact, and his speech was coherent and goal-directed without loosening of associations or flight of ideas; that his mood was depressed, with his affect constricted to his mood; and that he was able to perform simple arithmetic calculations, but he could not abstract from English proverbs. He was assessed with a depressive disorder, not otherwise specified,

with a global assessment of functioning (GAF) rated at 70.

At the hearing, the claimant testified that he is 41 years old, and is a college graduate. He formerly worked as a computer programmer and a design developer for securities trading software for J.P. Morgan Chase. He last worked on June 28, 2001. He testified that he was given a severance package, and that he collected unemployment insurance benefits following his employment termination. He stated that he is unable to work due to a post-traumatic stress disorder and a prolonged duress stress disorder, secondary to years of mental abuse and discrimination at his workplace. He stated that he has filed a civil action against his former employer for discrimination, harassment and intentional infliction of emotional distress; that he is unable to concentrate or focus on anything other than his pending litigation; that he has become very reclusive, without any current socialization; that he is prone to outbursts of rage and violent tendencies; and that he also suffers from severe chronic fatigue, as well as acute anxiety.

The evidence supports a finding that the claimant has a severe impairment referable to a post-traumatic stress disorder. Although severe, there is an insufficient clinical basis to conclude that said impairment meets or equals the criteria of any disorder as contained within the Listing of Impairments (20 CFR Part 404, Appendix 1 to Subpart P). Specifically, the findings do not warrant application of medical listing 12.06, pertaining to anxiety-related

disorders. In this regard, while there is evidence of recurrent and intrusive recollections of a traumatic experience which are a source of marked distress, there is no basis for assessing marked restrictions in any two of the Part B categories applicable to this listing.

Insofar as listing-level severity or equivalence has not been established, it must be determined whether the clamant retained the residual functional capacity to perform his past relevant work or to adapt to other work at any time prior to July 16, 2002.

The undersigned hereby adopts the state agency medical consultants' conclusions regarding the claimant's inability to engage in a full, wide or significant range of work activity at any exertional level, as rendered at the reconsideration level of review (Exhibits 6F-9F). The basis for an inability to perform and past relevant work or other work on a sustained, remunerative basis includes *Social Security Ruling 85-15 and 96-8p,* relating to the inability to perform the basic mental demands of even unskilled work on a consistent pace, interpreted as 8-hours per day for 5 days per week, or an equivalent schedule.

It is noted that the onset date established by the state agency corresponds to the claimant's initiation of treatment with Dr. Beaulieu. Although the evidence does not chronicle any type of medical or mental health treatment prior to July 16, 2002, it can safely be assumed that the level of severity of the claimant's condition was present for the six-month period before

he pursued any manner of psychiatric treatment. Hence, it is concluded that the claimant's disability commenced on January 28, 2002, and not July 16, 2002, as previously determined by the Social Security Administration.

However, there is no basis for extrapolating a disability onset date prior to that juncture, particularly given the dearth of any supporting medical evidence dating back to that timeframe. Moreover, it is noted that by his own sworn testimony, the claimant reported at the hearing that he had collected state unemployment insurance benefits for approximately a 6-month period following his employment cessation. Administrative notice is made of the fact that as a condition for receipt of such benefits, an individual must attest that he/she is not only capable of accepting a job if one is offered, but must be proactively seeking such employment. The claimant cannot certify his ability to work for the purpose of receiving state benefit entitlement, and subsequently contend that he was incapable of working during the exact same timeframe for the purpose of collecting federal disability benefits. Hence, the claimant is effectively estopped from purporting disability during the period of his receipt of state unemployment insurance benefits.

In light of the foregoing, it is concluded that the claimant has been under a disability within the meaning of the Act and pertinent regulations since January 28, 2002, but not prior thereto, and not July

16, 2002, as previously determined by the Social Security Administration.

FINDINGS

After careful consideration of the evidence, the undersigned Administrative Law Judge makes the following findings:

1. The claimant meets the insured status requirements of Title II of the Act at all times relevant herein.

2. The claimant has not engaged in any substantial gainful activity since the alleged onset date of June 28, 2001. He thereafter collected state unemployment insurance benefits for approximately 6 months following his employment cessation.

3. On and after January 28, 2002, the claimant has had a severe impairment referable to a post-traumatic stress disorder.

4. This severe impairment has not met or equaled the criteria of any disorder as contained within the Listing of Impairments (20 CFR Part 404, Appendix 1 to Subpart P), including medical listing 12.06.

5. The claimant's subjective allegations regarding his impairments and their functional effects, while generally credible, are not supported by objective medical

documentation through the alleged onset date.

6. On and after January 28, 2002, the claimant has lacked the residual functional capacity to perform his skilled past relevant work as a computer programmer/software designer.

7. The claimant is a younger individual, with a college education and skilled past relevant work experience.

8. On and after January 28, 2002, the claimant has been incapable of performing other jobs that exist in significant numbers in the national economy, pursuant to the tenets of *Social Security Rulings 85-15 and 96-8p*.

9. The claimant has been under a disability within the meaning of the Act and pertinent regulations since January 28, 2002, but not prior thereto, and not July 16, 2002, as previously determined by the Social Security Administration.

DECISION

It is the decision of the undersigned Administrative Law Judge that based upon the application filed on October 15, 2002, the claimant is entitled to a period of disability beginning on January 28, 2002, but not prior thereto, and to disability insurance benefits in

accordance with sections 216(i) and 223 of the Social Security Act.

/s/ Marilyn Mann Faulkner
MARILYN MANN FAULKNER
Administrative Law Judge

APR 13 2005
Date

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTIAN WILLIAMS Plaintiff, – Against	PLAINTIFF'S OBJECTIONS TO MHD'S REPORT AND RECOMMENDATION
J.P. MORGAN CHASE BANK, RAYMOND KONG, STEVE RUTTER, PETER BIBB, GARY FORD and ANTHONY SHEFFERT Defendants	02 CIV 4250 (GBD)(MHD)

As per Rule 72 of the Federal Rules of Civil Procedure and the attached extension order granted until November 29, 2005 to enter Plaintiff's objections, Plaintiff respectfully enters these objections to the Court of the U.S.S.D.N.Y.

Judge Dolinger does not understand "Workplace Bullying/Mobbing" and therefore has not appropriately or correctly analyzed the evidence presented. His honor's analysis accepts blatant overt harassment but ignores its more psychologically damaging insidious and/or covert counterpart. Both are illegal

but only the former has been looked for in his honor's analysis. Insidious and/or covert psychological harassment can be recognized by analyzing it within a "Workplace Bullying/Mobbing" context and in hindsight by its aftermath, but it is difficult to recognize by any uninformed or uneducated employee while it is occurring. Effective Human Resources (HR) policies and procedures can detect "Workplace Bullying/ Mobbing" and prevent psychiatric injury. However J.P. Morgan Chase's policies and procedures were not followed by defendants in the case of Plaintiff's complaints about Kong, or Plaintiff's requests for a fair and impartial 360 degree review in which defendant Kong did not take part, or in Plaintiff's request that defendant Kong use the J.P. Morgan Chase Flexibility Formula to determine how much flexible work arrangements were allowable on the LOPS team, or in Plaintiff's request that defendant Kong be given a 360 degree review where Plaintiff did not take part, or in the selection process which resulted in Plaintiff's termination, or in the demographic impact analysis in which Plaintiff was not considered to be part of any protected status group. Plaintiff received no review at all for 2000, even though he asked for a 360 degree review where Kong did not take part and subsequent to plaintiff having told Kong's managers it was impossible for Kong to give plaintiff a fair and impartial review.

His honor has erroneously reduced Kong's acts of psychological abuse which have disabled Plaintiff under the law pursuant to the tenants of Social

Security Rulings 85-15 and 98-8p to "not everything that makes an employee unhappy is an actionable adverse action." Kong's treatment of Plaintiff was not merely a collection of things that made Plaintiff unhappy. Those acts were insidiously hostile psychologically abusive harassment and not in line with customer focus, not in line with J.P. Morgan Chase Policies, Procedures, and stated company values, and not in line with the strategic alignment of the goals of the bank. "Acute psychiatric injury" is not a natural and unavoidable consequence arising out of and in the course of employment at a bank. Plaintiff's acute psychiatric injury was the causal effect of Kong's workplace bullying and other defendants and HR turning a blind eye for years to Kong's "Psychological Terrorism"[1].

His honor's application of Title VII analysis is flawed because it makes false assumptions and is out of touch and in conflict with current evolved knowledge of harassment, hostile work environment, organizational behavior, the typology of organizational response to allegations of "workplace bullying" and comparative law. Therefore his honor uses incorrect assumptions and comes to incorrect conclusions that

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[1] For example, *mobbing*, *moral harassment* and *psychological terrorism* are often used in continental Europe, whereas the United Kingdom and Australia typically refer to *workplace bullying* (8 Employee Rts. & Employment Pol'y J. (2004) Pg 242, PRAGMATISM'S INUSLT: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence by Brady Coleman Pg 241)

thwart the law that Title VII analysis is supposed to enforce His honor's application of Title VII Analysis is flawed because it would, has in this case, and likely has routinely let more psychologically damaging hostile environments characterized by insidious workplace bullying tactics off the hook, while finding illegal less psychologically damaging environments of more overt and blatant hostility which is easier for an employee to identify, describe, and appropriately deal with. His honor has erroneously deemed "legitimate management decisions" to defendant Kong's acts which were instead unrelated to legitimate business interests, or counter productive to legitimate business interests, or arbitrary, or capricious, or had cross-purposes extraneous to legitimate business interests, and which were also "psychologically abusive." More specifically his honor has failed to recognize that the most psychiatrically damaging acts of defendant Kong were all those acts which his honor has either ignored or incorrectly labeled "legitimate management decisions," and which are the "Nexus" that his honor does not see. The "Nexus" is Kong's psychologically abusive acts as manager of inflicting consecutive performance maligning and performance sabotaging indignity after indignity via abuse of his authority as manager to the point where Plaintiff incurred disabling acute psychiatric injury. Kong's acts were unrelated to legitimate business interests, or counter productive to legitimate business interests, or arbitrary, or capricious, or had cross-purposes extraneous to legitimate business interests. Therefore, they were clearly not "legitimate management decisions."

Under the United States Code Title 18 Subsection 1514(c)1. Harassment is defined as "a course of conduct directed at a specific person that causes substantial emotional distress in such a person and serves no legitimate purpose".

Much of defendant Kong's conduct served no legitimate business purpose and was psychologically abusive to the point of causing disabling acute psychiatric injury in Plaintiff. As such it meets the definition of harassment contained in the law. Legitimate management decisions are in line with customer focus, human resources policies and procedures, and the goals of the firm and are not psychologically abusive.

William James argued in 1906: "Pragmatism unstiffens all our theories, limbers them up and sets each one to work."[2] Judge Richard Posner, who has famously applied a pragmatic approach to "limber up" legal doctrine across a broad spectrum of topics, writes:

> **[I]t is now recognized both within and without the legal profession that lawyers, judges, and law professors cannot "do" law without help from other disciplines. They don't know enough about the activities that the law regulates and**

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[2] What Pragmatism Means, in William James, Pragmatism: A New Name For Some Old Ways Of Thinking 17, 21 (2002).

> **the effects of legal regulation ... Pragmatists also believe, however, that intuition and opinion and the rest can sometimes be educated by immersion in the ... analytic methods, empirical techniques, and findings of the social sciences (including history).**[3]

(8 Employee Rts. & Employment Pol'y J. (2004) Pg 243, PRAGMATISM'S INSULT: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence by Brady Coleman)

It is Plaintiff's opinion and belief that Judge Dolinger looked at the 10 inches of documentation Plaintiff submitted in 2 five inch binders and then looked at defendants' documentation of ⅓ the size and did what was more simple and expedient for him to do; Plaintiff believes his honor simply echoed the arguments of defense council written by attorneys, and for the most part ignored in its entirety the ten inches of documentation presented by the Pro Se Plaintiff on Social Security Disability. Plaintiff does not believe his honor read the uncorrected unverified transcript or came close to thoroughly examining the evidence presented. His honor ignored all the rebuttal information in the evidence and the transcript regarding multiple events. His honor severely distorts the events with regard to John Shea ignoring the transcript and Defendant Kong as the root cause of the

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[3] Richard A. Posner, The Problematics of Moral and Legal Theory vii-viii (1999).

rift between Plaintiff and Shea. His honor also distorts the reasons for the apology in the deposition. His honor ignored the evidence impeaching all Kong controlled employee reviews. His honor ignored the fact that the demographic impact analysis done by HR did not consider Plaintiff to be a part of any protected status group even though Plaintiff's domestic partner was still on his benefits statement and the bank had paid for his domestic partner's health insurance for a period. It was therefore a flawed demographic analysis incompatible with NYCHRL, N.Y.C. ADMIN. CODE SS 8-107 and NYSHRL, EXECUTIVE LAW 296. His honor ignored the extreme difference in subjective effects on Plaintiff: "acute psychiatric injury". His honor ignores the differences in the way defendants and human resources responded to Plaintiff's complaints about Kong compared to their response to heterosexual employee Hevel Jean-Baptiste's complaints about Kong. In summary, it is Plaintiff's opinion and belief that Judge Dolinger has in fact done the opposite of what he was supposed to do. His Honor has put the evidence in the most favorable light for the moving party and not for the "non-moving" party, the Plaintiff. If Judge Dolinger did not want to go through Plaintiff's response his honor could have, in September of 2004, rejected the motion for summary judgment without prejudice to renew pending the writing of a joint pre-trial statement and evidence weeding out process. But his honor chose to issue a recommendation.

Defendants have denied liability for Plaintiff's psychiatric injury but they have not contested in their motion for summary judgment or response to Plaintiff's response that Kong's behavior toward Plaintiff was psychologically abusive and that it caused plaintiff's psychiatric injury. Dr. Henry Victor Beaulieu's diagnostic cause of "Psychological Abuse" by defendant Kong is docketed medical evidence that is unchallenged by defendants and by any other medical or licensed authority. It is reinforced by the docketed affidavit of Angela Torres-Esteves and now backed up by a ruling by a Federal Administrative Law Judge, and attached new affidavit of Plaintiff's current psychiatrist Dr. Marthe Abraham.[4] His honor is erroneously dismissive of Kong's behavior as the cause of Plaintiff's injury even with the evidence already docketed with the first amended complaint; The Court cannot ignore the medical evidence that defendant Kong's treatment of Plaintiff disabled Plaintiff under the law pursuant to the tenants of Social Security Rulings 85-15 and 98-8p. On summary judgment the court must conclude that Kong's behavior was sufficiently severe psychologically abusive harassment to cause acute psychiatric injury because the medical evidence is unchallenged and Kong's behavior as the diagnostic cause of the acute psychiatric injury is unchallenged. The recommendation does not address the question of whether or not Kong's behavior can

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[4] Exhibit CWOB-013 Affirmation of Dr. Marthe Abraham Dated November 7, 2005

legally be "psychologically abusive legitimate management decisions that cause acute psychiatric injury disabling an employee under the law."

His honor has not demonstrated that he recognizes the essential issue of the case. His honor ignores the unchallenged medical evidence that he is required to accept and view in Plaintiff's favor. The weighing of legitimacy of evidence is a question for a jury. His honor also ignores Plaintiff's claim of "personal psychiatric injury" which is a "personal injury" claim. In Addition, Judge Dolinger signed the recommendation on August 19, 2005 which happens to be the last day prior to the U.S.C.A. allowing Plaintiff to renew Plaintiff's petition for mandamus. This fact leads Plaintiff to believe there is a hidden agenda to deliberately prevent Plaintiff from renewing Plaintiff's request to have the U.S.C.A. intervene, investigate, alleviate, and solve the pending decision problem in Judge Daniels' courtroom.

Plaintiff tried twice in May of 2005 to enter complaints of misconduct through the U.S.C.A.'s Clerk's Office pursuant to 28 U.S.C. ss 351 et seq. Both of Plaintiff's attempted complaints were rejected without action and without being forwarded to the Judicial Council. The first time, Ms. Pat Chin-Allen didn't like the font size (10 point instead of 12 point). The second time Ms. Pat Chin-Allen didn't like the 158 pages of exhibits (Plaintiff had added a copy of the Cross-Motion to Remove Ms. Bonnaig for Cause and associated exhibits). Upon receiving the second rejection at the beginning of June 2005, Plaintiff

called Ms. Pat Chin-Allen and requested to meet with her in order to get Plaintiff's complaints of misconduct into a form that would be acceptable to her. She refused to meet with Plaintiff without the Clerk of the Court for the U.S.C.A. for the 2nd Circuit, and she told Plaintiff to wait to hear from the Clerk. It has been over five months and plaintiff still has not heard anything from the Clerk of the Court of Appeals. Furthermore, plaintiff has discovered a complaint of misconduct about Judge Daniels by a Dr. Michael Hall of 00 Civ 7858. Dr. Hall contends that he too had twice tried to enter complaints of misconduct on Judge Daniels with the Clerk of the U.S.C.A. for the 2nd Circuit and twice his complaints have been rejected without action without being forwarded to the Judicial Council.[5] Also attached is the letter to Dr. Hall written by Chief Justice Mukasey, in which the chief justice writes "I have no authority to review cases on the docket of any other judge of this court".[6]

Plaintiff finds it disturbing that Judge Dolinger believes that the complaint process at J.P. Morgan Chase works when even the 2nd Circuits' complaint process is broken or as Dr. Hall puts it in his affidavit "corrupt." What disturbs Plaintiff even more is that Chief Justice Mukasey wrote about his "no authority" on February 10, 2005 after Plaintiff had asked the

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[5] Exhibit CWOB-014 Affirmation of Dr. Michael James Hall Dated October 28, 2005.

[6] Exhibit CWOB-015 Letter to Dr. Hall From Chief Justice Mukasey dated Feb. 10, 2005.

U.S.C.A. to "granting [grant] (as per 21(c)) the U.S.S.D.N.Y. and Chief Justice Michael Mukasey any appropriate fair, impartial, and lawful authority they may currently be lacking which is necessary to reassign civil litigation appropriately and eliminate Judge Daniels' exorbitantly large civil pending decision queue.." in a petition for mandamus entered January 31, 2005. Plaintiff can only conclude that the Chief Justice wants nothing to do with the problem or resolving it. As the complaint process in the 2nd Circuit is broken and unresponsive Plaintiff must enter his abbreviated complaints of misconduct within this document in order to get them into the record of the case. Accordingly Plaintiff is formally asking for the immediate recusal of both Judge Daniels and Judge Dolinger or that they formally state the reasons why they should not and will not recuse themselves at this time. Plaintiff will regard a lack of recusal, and a subsequent ruling against him on the summary judgment motion to be a retaliatory hostile act of discrimination against plaintiff as a gay man, a pro se litigant, and a psychiatrically injured person on Social Security disability.

Plaintiff was not permitted to use the Pro Se Office to file the Cross-Motion to Remove Ms. Bonnaig for Cause, because as the Pro Se Office told him, Plaintiff technically had representation from Ms. Bonnaig and therefore Plaintiff was not permitted to use the Pro Se Office. Plaintiff hand delivered the cross-motion to Judge Daniels' chambers on October 11, 2002. Judge Daniels ruled the same day ignoring

the causes of action in Plaintiff's cross-motion, by simply removing Ms. Bonnaig. Plaintiff believes that cross-motion contains all the basic elements necessary for a legal malpractice lawsuit against Ms. Bonnaig. Furthermore, Plaintiff also believes that the root cause of any legal malpractice Ms. Bonnaig may have committed, as well as why it took so long for her to file the case, were her doubts about Plaintiff's credibility which were created by the letter written by John R. Vega representing the Litigation Prevention Department of J.P. Morgan Chase Bank which effectively called Plaintiff a liar to Plaintiff's lawyer and which undermined Plaintiff's credibility with Ms Bonnaig as evident in the letter Plaintiff faxed to Ms. Bonnaig on April 29, 2002 two days before the filing of the case: "Do you work for me or J.P. Morgan Chase? . . . J.P. Morgan Chase is not going to be concerned with principle. They will act like wolves. They have shown that quite clearly by effectively calling me a liar in their letter to you."[7] If Plaintiff had not pushed Ms. Bonnaig, she would have probably let the 1 year time bar run out on everything leaving Plaintiff with no legal recourse whatsoever.

By ignoring the cross-motion, Judge Daniels, did irreparable harm to Plaintiff's ability to obtain and retain new counsel for 02 Civ 4250. Without a 'removal for cause' order all potential attorneys demanded to

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[7] See Exhibit C of the Cross-Motion to Remove Denise Bonnaig for Cause, entered at Judge Daniels Chambers on October 11, 2002.

speak with Ms. Bonnaig or they would not take the case. Without a refund of any kind, Plaintiff had no lump sum to pay a new attorney. Legal consultations became a cycle of pay a consultation fee and "we won't take your case" "you have no money to pay for a lawsuit" "we want to speak with Ms. Bonnaig." Plaintiff also believes your honor Judge Daniels did a disservice to Ms. Bonnaig whose doubts and resulting malpractice were in essence caused by Mr. Vega's letter, which was a malicious and standard tactic used by the J.P. Morgan Chase Litigation Prevention Department. It is impossible for plaintiff to believe that a federal judge does not recognize a letter like Mr. Vega's to be a "malicious standard tactic"; Yet Judge Dolinger reduces that letter to mere opinion despite it being a direct communication from a bank officer representing the J.P. Morgan Chase Litigation Prevention Department and despite the damage it caused to the relationship between Plaintiff and his former attorney. Judge Daniels' decision to ignore Plaintiff's cross-motion occurred over three years ago, and it is still affecting Plaintiff's case today. Over three years of trying to work with Judge Daniels have not cured that violation of Plaintiff's rights as a litigant; Just as nearly four years of trying to work with defendant Kong have not cured Kong's violations of Plaintiff's rights as an employee and a human being. The only thing that is likely to possibly cure Judge Daniels' violation of Plaintiff's rights as a litigant would be a defeat of the motion for summary judgment, scheduling of the writing of a joint pre-trial statement, and scheduling of trial.

Also, Plaintiff believes there is both a structural and actual bias within the court favoring institutions over individuals and lawyers over pro se litigants. To wit the pro se office could not tell Plaintiff of any civil case in the U.S.S.D.N.Y. in which a pro se litigant won the case. Such a statistic can be used as legal proof of bias either structural or individual against pro se litigants. While a magistrate is permitted to speak with members of the bar individually concerning a case, no such appropriate communication is permitted when a pro se litigant is involved, thus handicapping the pro se litigant and his/her effective communication with the court even further. Not all district courts have pro se offices. Plaintiff believes that the existence of the pro se office in the U.S.S.D.N.Y. is to shield judges from appropriately having direct communication with pro se litigants whom they ought to speak with directly just as they speak with attorneys.

Judge Dolinger's actions are a clear violation of his duties as a "finder of fact" on a summary judgment motion. Plaintiff believes Judge Dolinger's actions to be judicial malpractice, nonfeasance, misfeasance, and malfeasance. Plaintiff must ask that a new presiding judge throw out Judge Dolinger's recommendation, read the educational materials regarding workplace bullying, do a new comprehensive analysis going through all the evidence presented, including the newly entered attached evidence, and to learn what is pragmatically appropriate for his/her honor to learn,

and to do a comprehensive analysis of the arguments and facts presented.

The court has without argument restricted the executive managerial prerogative of the Secretary of Labor to grant, deny, or revoke authorized private action to enforce Title 29; Judge Dolinger recommends effectively granting defendants "Managerial Prerogative Unlimited" to violate their own policies and procedures, as well as the law, as long as the discriminatory/harassing conduct is of a more insidious and covert nature instead of a more blatant and overt nature. The ruling on authorized private action restricting managerial prerogative and the current recommendation granting managerial prerogative unlimited are in discord with each other.

Defendants have denied liability for Plaintiff's psychiatric injury but they have not contested in their motion for summary judgment or their response to plaintiff's response that Kong's behavior toward Plaintiff was psychologically abusive and that it caused Plaintiff's psychiatric injury. Dr. Henry Victor Beaulieu's diagnostic cause of "Psychological Abuse" by defendant Kong is unchallenged medical evidence. It is reinforced by the Affidavit of Angela Torres-Esteves. Further Dr. Beaulieu's diagnosis is now backed up by a ruling by a Federal Administrative Law Judge, and an affidavit from psychiatrist Dr. Marthe Abraham. The court should not have ignored it even with the evidence docketed; the court cannot now ignore the medical evidence that defendant

Kong's treatment of Plaintiff disabled Plaintiff under the law. More Specifically:

"On and after January 28, 2002. the claimant has had a severe impairment referable to a post-traumatic stress disorder."[8]

"This severe impairment has not met or equaled the criteria of any disorder as contained within the Listing of Impairments (20 CFR Part 404, Appendix 1 to Subpart P), including medical listing 12.06.[9] [Plaintiff's form of PTSD → PDSD Prolonged Duress Stress Disorder is not yet listed in the List of Impairments. PDSD is caused by a series of events not just one.[10] Hostile work environment is about a series of hostile events, not just one.]

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[8] See Exhibit CWOB-001-12 Federal Administration Law Judge Ruling Dated April 13, 2005

[9] See Exhibit CWOB-001-12 Federal Administration Law Judge Ruling Dated April 13, 2005

[10] Evidence has also been reported of a relationship between bullying and symptoms such as hypervigilance, rumination, and nightmares, which are consistent with Post-Traumatic Stress Disorder (PTSD). While PTSD has been viewed as a reaction to a single traumatic incident, bullying as we have argued is a condition of prolonged exposure to hostile treatment. British research on the effects of persistent long-term exposure to work-related stress has applied the term of Prolonged Duress Stress Disorder (PDSD) to these constellations of symptoms. Regardless of the label, evidence supports the emotionally and psychologically destabilizing effects of prolonged exposure to bullying behaviors. (8 Employee Rts. & Employment Pol'y J. (2004) Pgs. 345 Bullying In The Workplace: Its Impact and Management by Loraleigh Keashly and Joel H. Neuman)

On and after January 28, 2002, the claimant has been incapable of performing other jobs that exist in significant numbers in the national economy, pursuant to the tenants of *Social Security Rulings 85-15 and 96-8p.*[11]

Judge Dolinger has inappropriately discounted Dr. Beaulieu's affidavit because it is not notarized at the same time his honor fails to mention that it has the doctor's license hand stamp on it. Judge Dolinger also fails to examine the evidence presented. Dr. Beaulieu does not just refer to defendant Kong's psychological abuse as being the cause of Plaintiff's psychiatric injury in one document; it is referred to in the general letter written primarily for Plaintiff's former attorney Ms. Denise Bonnaig dated August 13, 2002 (See Cross-Motion To Remove Ms. Bonnaig for Cause Exhibit H) "Christian Williams is suffering from Acute PTSD (Post Traumatic Stress Disorder) as a result of being psychologically abused at work and cruelly packaged out by his boss Mr. Raymond Kong."; It is referred to in Dr. Beaulieu's own handwriting five months later to Social Security in Exhibit SSA 0072 dated January 7, 2003. It is also now referred to in the new affidavit of plaintiff's current psychiatrist Dr. Marthe Abraham.

Mr. Williams psychiatric treatment began with the late Dr. Beaulieu whom diagnosed him with

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[11] See Exhibit C WOB-001-12 Federal Administrative Law Judge Ruling Dated April 13, 2005

acute PTSD as per chart documentations the onset of PTSD is a result of psychological trauma that his former boss R. Kong inflicted on him at JPMorgan Chase Bank. . . . His psychological low point came when the court unnecessarily delayed their ruling on his case, and a newspaper article appeared criticizing the judge in his case. At that time Mr. Williams had relapsed into acute PTSD symptomatology. . . . It is my professional opinion based on a fair degree of medical certainty that Mr. Williams's psychiatric impairment stemmed from emotional trauma caused by psychological abuse suffered at his work place.[12]

Further the Cross-Motion To Remove Denise Bonnaig For Cause – Exhibit A Plaintiff's affidavit item 37 states "Plaintiff would like to formally ask Hon. George B. Daniels. . . . to contact Plaintiff's psychiatrist Dr. Henry Beaulieu so that his honor is thoroughly familiar with Plaintiff's mental state, diagnosis, and prognosis." Plaintiff believes had his honor contacted Dr. Beaulieu, the court would not be dismissive of the diagnostic cause of Plaintiff's psychiatric injury and this case would have likely been brought to a positive end in Plaintiff's favor in 2002 or 2003. Further, Plaintiff believes any reasonable juror would deduce from the ruling by the Federal

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[12] See Affirmation of Dr. Marthe Abraham Dated November 7, 2005 Exhibit CWOB-013.

Administrative law judge that had Plaintiff not collected unemployment and had Plaintiff seen Dr. Beaulieu six months earlier that Plaintiff's SSD as of disability date would likely correspond to the day after Plaintiff's last day of employment with the bank. Further, Plaintiff believes any reasonable juror would conclude that Plaintiff incurred and been suffering from one level of PDSD while working for defendant Kong and that Kong's final acts, including termination, pushed Plaintiff into the acute level of the condition. Judge Dolinger ignores the relationship between Kong's behavior and Plaintiff's acute psychiatric injury.[13] Judge Dolinger fails to understand that PTSD symptoms like Plaintiff's caused by workplace bullying are of a severity level comparable to the PTSD symptom severity level of rape victims.[14]

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[13] Id.

[14] In discussing the role of mobbing in the development of PTSD, Leymann and Gustafsson analyzed data from 350 victims of mobbing at work (from a sample of 2428). Leymann and Gustafsson compared the PTSD symptoms of victims of mobbing to the PTSD symptoms reported in other studies of people who had run over and killed suicidal person on railroad tracks or subway lines, as well as to symptoms shown by victims of sexual assault. Mobbing victims had considerably higher degrees of PTSD results than the conductors who reported psychological problems following their involvement in these gruesome suicides. Leymann and Gustafsson hypothesized that mobbing victims showed similar PTSD results to rape victims, but less so to the conductors who suffer from trauma because the former traumatic events are typically

> Followed by a series of further traumatizing rights violations and identity insults from different social

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Bottom Line: The question that must be answered by the recommendation Judge Dolinger does not even ask: **"What was[were] the preponderant motive(s) for defendant Kong's treatment of Plaintiff over a period of nearly 4 years which caused Plaintiff and Plaintiff alone, the lone homosexual employee of Kong's team, to incur acute disabling psychiatric injury?"** One thing is certain; that "motive" was not "legitimate RIF". Further, that "motive" was the driving motive in the selection process where Defendant Kong chose Plaintiff to be terminated from the bank at cross-purposes with the phony "RIF" request which put a new label on Plaintiff's continuing to exist job and role and which eliminated the job and role of Mr. Harrison Wu. Plaintiff's job was taken away from Plaintiff and given to someone else; putting a new label on Plaintiff's job and role won't change that fact. Ms. Terry's affidavit of August 2004 still refers to the "LOPS" team because "LOPS" was the team's job/role and that job/role did not change. The recommendation has not stated what the predominant motive(s) was for

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> sources . . . This did not occur in the groups of engine drivers but it did occur in cases of raped women – and, of course, in mobbed employees in question in the present study. Mobbing and expulsion from the labor market are in themselves a series of victimizations of traumatic strength

(8 Employee Rts. & Employment Pol'y J. (2004) Pg 299, PRAGMATISM'S INSULT: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence by Brady Coleman)

Kong's behavior which caused Plaintiff's acute disabling psychiatric injury. Therefore there is a genuine question of material fact that does have to be decided. Judge Dolinger has recognized in his recommendation some disconnects and unanswered questions. If the Court understands the evidence, there are no disconnects, and there should be no unanswered questions. Plaintiff contends that defendant Kong's predominant motives were because plaintiff is gay and Kong thought Plaintiff was HIV+. The recommendation does not state what Kong's motives were which drove and caused Plaintiff's acute disabling psychiatric injury. If the Federal Courts are going to rule against Plaintiff on a motion for summary judgment then the court must exclude "because plaintiff is gay" and "because Kong thought Plaintiff was HIV+" as the motives for Kong's behavior which caused plaintiff's disabling psychiatric injury, which was also the driving motive which caused Kong to select plaintiff for termination at cross-purposes with the RIF request. The recommendation has not excludes [sic] these motives, nor has it even identified the motivational cause of Kong's treatment of plaintiff over a period of years which caused disabling psychiatric injury in plaintiff alone. Judge Dolinger has inappropriately ignored the main issue of the case, an issue that is correspondingly avoided in defendants' motion for summary judgment.[15] Judge Dolinger fails

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[15] Note, the "Employment Rights and Employment Policy Journal" Volume 8, Number 2/2004, which was actually published

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to understand the nature and behavioral domain of bullying.

In terms of its nature, the behavioral domain of bullying is characterized by seemingly "minor" behaviors. The bulk of aggressive behaviors in the workplace are nonphysical, indirect and passive. For more specific examples, please refer to Table 1 which provides "top 10 lists" of the aggressive behaviors employed by supervisors, coworkers, and subordinates – as captured within the Workplace Stress and Aggression Project, within the United States Department of Veterans Affairs (hereafter referred to a s [sic] **the VA Project).**[16]

Paraphrased from table 1: aggressive behaviors employed by supervisors:

Top 10 List of Hostile Behaviors by Supervisors Listed in Descending Frequency of Occurrence by Source of Aggression are: Not given praise to which felt entitled, Given little or no feedback about performance, Delayed action on matters of importance, Given unreasonable workloads

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in 2005, is entirely dedicated to the "Rubric" of "Workplace Bullying/Mobbing." Much of the educational documentation contained in my objections is from volume 8 No. 2 of that law journal which was non-existent at the time of filing my response to defendants' motion for summary judgment.

[16] 8 Employee Rts. & Employment Pol'y J. (No. 2/2004) Pgs. 340-343 Bullying In The Workplace: Its Impact and Management by Loraleigh Keashly and Joel H. Neuman

or deadlines more than others, Contributions ignored by others, Lied to, Reprimanded or "put down" in front of others, Failed to give information needed, Denied a raise/promotion without valid reason, and Flaunted stated/ treated in a condescending manner.[17]

These behaviors are subtle, often not readily observable by others, and frequently involve withholding something of value from the target, such as, information, recognition or acknowledgement. When exposure is repeated and prolonged, such behaviors can be experienced as attempts (often successful) to isolate or remove the target from active and effective participation in the workplace; in effect, communicating a devaluation of the person and their contributions – with resulting damage to their self-esteem and career opportunities.

These top ten lists also demonstrate that there is variability in bullying behaviors depending on the relationship between the actor and the target.[18]

WITH REGARD TO TITLE VII ANALYSIS

Title VII is aimed at the consequences or effects of an employment practice and not at the motivation of

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[17] Id.

[18] Id.

employment practice and not at the motivation of co-workers or employers. Civil Rights Act of 1964, ss 701, 42 U.S.C.A. ss 2000e

While sex specific or gender specific content is one way to establish discriminatory harassment, under Title VII, it is not the only way; direct comparative evidence about how the alleged harasser treated members of both sexes is always an available evidentiary route. Civil Rights Act of 1964, ss 701, 42 U.S.C.A. ss 2000e

The ultimate question in analyzing a Title VII sex-based hostile work environment claim is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. Civil Rights Act of 1964, ss 701, 42 U.S.C.A. ss 2000e

The "because of sex" element of a Title VII sex-based hostile work environment action does not require that the harassing behavior be either of a sexual nature or motivated by sexual animus. Civil Rights Act of 1964, ss 701, 42 U.S.C.A. ss 2000e

A pattern of abuse in the workplace directed at women, whether or not it is motivated by lust, or by a desire to drive women out of the organization, can violate Title VII. Civil Rights Act of 1964, ss 701, 42 U.S.C.A. ss 2000e

Evidence of differences between male and female employees in subjective effects, along with evidence of

differences in objective quality and quantity of treatment in the workplace, is relevant to determining whether or not men and women were treated differently, for purpose of Title VII gender discrimination case, even where the conduct is not facially sex-specific or gender-specific. Civil Rights Act of 1964, ss 701, 42 U.S.C.A. ss 2000e

An unbalanced distribution of men and women in relevant employment positions, and the fact that some men were also harassed, does not automatically defeat a showing of differential treatment, for the purpose of Title VII gender discrimination claim. Civil Rights Act of 1964 ss 701, 42 U.S.C.A. ss 2000e

The rule is that the required showing of severity or seriousness of the harassing conduct, for purpose of Title VII hostile work environment claim, varies inversely with the pervasiveness or frequency of the conduct.. Civil Rights Act of 1964 ss 701, 42 U.S.C.A. ss 2000e

Therefore NYCHRL, N.Y.C. ADMIN. CODE SS 8-107 and NYSHRL, EXECUTIVE LAW 296 ANALYSIS should be consistent with:

Title VII analysis for NYCHRL and NYSHRL ought to be aimed at the consequences or effects of an employment practice and not at the motivation of employment practice and not at the motivation of co-workers or employers.

While gay specific or sexual orientation specific content is one way to establish discriminatory harassment,

under Title VII Analysis for NYCHRL and NYSHRL, it is not the only way; direct comparative evidence about how the alleged harasser treated members of different sexual orientations is always an available evidentiary route.

The ultimate question in analyzing a Title VII Analysis for NYCHRL, N.Y.C. ADMIN. CODE SS 8-107 and NYSHRL, EXECUTIVE LAW 296 sexual orientation based hostile work environment claim is whether members of one sexual orientation are exposed to disadvantageous terms or conditions of employment to which members of the another [sic] sexual orientation are not exposed.

The "because of sexual orientation" element of a Title VII Analysis based NYCHRL, and NYSHRL sexual orientation based hostile work environment action does not require that the harassing behavior be either of a sexual-orientation nature or motivated by sexual-orientation animus.

A pattern of abuse in the workplace directed at homosexuals, whether or not it is motivated by lust, or by a desire to drive homosexuals out of the organization, can violate Title VII Analysis for NYCHRL and NYSHRL.

Evidence of differences between homosexual and heterosexual employees in subjective effects, along with evidence of differences in objective quality and quantity of treatment in the workplace, is relevant to determining whether or not homosexuals and heterosexuals were treated differently, for purpose of

NYCHRL and NYSHRL Analysis sexual-orientation discrimination case, even where the conduct is not facially sex-specific or sexual-orientation-specific.

An unbalanced distribution of heterosexuals and homosexuals in relevant employment positions, and the fact that some heterosexuals were also harassed, does not automatically defeat a showing of differential treatment, for the purpose of NYCHRL, N.Y.C. ADMIN. CODE SS 8-107/NYSHRL sexual-orientation discrimination claim.

The rule is that the required showing of severity or seriousness of the harassing conduct, for purpose of NYCHRL, N.Y.C. ADMIN. CODE SS 8-107/NYSHRL hostile work environment claim varies inversely with the pervasiveness or frequency of the conduct. .

In other words the consequences or effects of an employment practice on homosexuals are key in this case. Behavior by a manager which causes an employee to incur acute psychiatric injury is the business of the courts. Disparate effect of "acute psychiatric injury" and disparate treatment of ignoring plaintiff's complaints and acting on the complaints of Hevel Jean Baptiste, not considering Plaintiff to be part of any protected status group, and the very different subjective effects upon homosexual plaintiff, are key factors that should be considered in the analysis, but Judge Dolinger does not consider those factors. Judge Dolinger has not appropriately compared the way Mr. Fisch a former gay employee, and Plaintiff were treated relative to the actual and

perceived heterosexual employees. Judge Dolinger has inappropriately discounted Mr. Fisch's docketed affidavit when he is required to "view the record in the light most favorable to the non-moving party." The reasons that Plaintiff had to get any affidavits at all were made clear in the Cross-Motion To Remove Ms. Bonnaig for Cause filed October 11, 2002 at Judge Daniels Chambers. Plaintiff had asked Ms. Bonnaig to:

"ask about his [Kong's] pattern of malice generally as well as his pattern of malice against Plaintiff personally and document both.... I was able to obtain a useful affidavit from Bob Fisch, which is even more relevant now that I know I am suffering from Acute PTSD as a result of being psychologically abused at work by Raymond Kong, now that I know his methods are far more devastating than any of his motives.... Upon information and belief Ms. Bonnaig wanted witnesses to say something to the effect of "I saw Mr. Kong discriminate against Christian Williams because he is gay." Because she could not be spoon fed with such an easy response, I believe she deemed the process of documenting Mr. Kong's pattern of

malice against me as pointless. So she did not pursue it with the witnesses."[19]

Plaintiff was asked by Ms. Bonnaig to speak with Mr. Fisch and to obtain affidavits, as described further in the cross-motion. Judge Dolinger makes false assumptions about defendant Kong's behavior and what it means. The fact that Plaintiff was the only gay employee on Kong's team and became the only individual who incurred acute psychiatric injury ought to be sufficient evidence of disparate quantity and quality of treatment by defendant Kong. Judge Dolinger makes improper inferences in his recommendation that are false claiming that Plaintiff "peppered" his complaint with instances of Kong's bad treatment and linked it to anti-gay bias "To make up for lack of evidence on this score" [MHD Recom 52]. That inference is false and definitely not drawn in favor of the non-moving party. In fact to Plaintiff it smacks of discriminatory animus by Judge Dolinger himself. It is also an inference that "only a jury is allowed to make." The fact that Plaintiff's response may appear to be peppered is, if anything, a reflection of Plaintiff's psychiatric state, Plaintiff's experiences working for Kong, and symptomatic of Plaintiff's psychiatric injury, it had absolutely nothing to do with Judge Dolinger's false conclusion that it was written that way "to make up for lack of evidence on

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[19] See Cross-Motion to Remove Denise Bonnaig for Cause Exhibit A, entered at Judge Daniels Chambers on October 11, 2002

this score." The extreme difference in subjective effects on plaintiff of acute disabling psychiatric injury is sufficient evidence of discriminatory animus by Kong. The descriptions of Kong's acts were not exaggerations or peppering; these were factual. A fair and impartial judge knowledgeable in Workplace Bullying would clearly see the "Nexus" that Judge Dolinger fails to acknowledge. Kong's behavior which Judge Dolinger deems "legitimate management decisions" has been criminalized in Sweden.[20] Comparative Law alone should demonstrate to the court that there is something severely flawed with his honors Title VII analysis.[21] This case is a discrimination case about

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[20] From Sweden's comprehensive and generic workplace and harassment legislation, criminalizing "*victimization*":

[R]ecurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in employees being placed outside the workplace community.[20] (8 Employee Rts. & Employment Pol'y J. (2004) Pg 242, PRAGMATISM'S INSULT: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence by Brady Coleman)

[21] COMPARATIVE LAW

Civil Code of Quebec Sec 51.18

For the purposes of this Act, "psychological harassment" means any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee. A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.(In force June 1, 2004) http://www.cnt.gouv.qc.ca/en/lois/normes/normes/harcelement.asp. These standards clarify the employer's obligations that already exist under the

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insidious and covert psychological harassment that caused disabling acute psychiatric injury. While EEOC vs. NEA deals mainly with overt and blatant hostility, its Title VII analysis rationale is relevant to this case which deals with more insidious and covert

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provisions of the Civil Code of Quebec and the Charter of Human Rights and Freedoms. These provisions establish the right to dignity, to respect and to the person's integrity, while guaranteeing employees fair and sufficient conditions of employment and a healthy work environment. [http://www.cnt.gouv.qc.ca/en/lois/normes/normes/harcelement.asp Click on Interpretation of 81.18]

Sec 81.19 Every employee has a right to a work environment free from psychological harassment. Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it. (IN FORCE ON JUNE 1, 2004) [http://www.cnt.gouv.qc.ca/en/lois/normes/normes/harcelement.asp] The fact that the employer is unaware of a harassment situation cannot relieve him of his responsibility. On the contrary, the employer's negligence or decision to turn a blind eye to a harassment situation engages his responsibility. [http://www.cnt.gouv.qc.ca/en/lois/normes/normes/harcelement.asp Click on Interpretation of 81.19] In Germany, the process happened without enactment of new regulations or legislation; instead, "the mobbing question was rapidly brought into the mainstream of traditional legal thought about dignity and respect . . . German jurists found it easy to conceptualize mobbing as a legal problem: It fit comfortably into some quite traditional German juristic concepts."." (8 Employee Rts. & Employment Pol'y J. (2004) Pg 262-263, PRAGMATISM'S INSULT: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence by Brady Coleman) "Sexual harassment in the eyes of most contemporary European observers is becoming simply one variety of employee harassment – and not necessarily the most important variety either."[21] (Id. Pg 260)

workplace bullying psychologically abusive harassment.

We have previously held that it is error to conclude that harassing conduct is not because of sex merely because the abuser "consistently abused men and women alike" Steiner v. Showboat Operating Co., 25 F.3d 1459, 1436 (9th Cir. 1994). In that case, the sex – or gender-specific character of the abuse directed at female employees was fairly obvious, and summary judgment was clearly not appropriate. Id. ("The numerous depositions of showboat employees reveal that Trenkle was indeed abusive to men, but that his abuse of women was different. It relied on sexual epithets offensive, explicit references to women's bodies and sexual conduct."). We went on to state that even if the supervisor had "used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby 'cure' his conduct toward women. Ellison unequivocally directs us to consider what is offensive and hostile to a reasonable woman." Id. At 1464. We acknowledge that our invocation of the "reasonable woman" standard, which renders sex-specific differences in the subjective effects of objectively identical behavior sufficient to ground a claim of discrimination, was rooted in the context of explicitly sex – or

gender – specific conduct or speech. We now hold that evidence of differences in subjective effects (along with, of course evidence of differences in objective quality and quantity) is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex – or gender-specific.

The record reveals at least a debatable question as to the objective difference in treatment of male and female employees, and strongly suggest that difference in subjective effects were very different for men and women.... A few instances of hostile behavior toward male employees – which the record suggest may have had a qualitatively different, "bantering" character – do not erase the possibility that a reasonable jury might find that the pattern of abuse directed at female employees was discriminatory. (2005 WL 2106164 (9th Cir. (Alaska)))

Correspondingly the fact that defendant Kong's psychologically abusive behavior was perceived by Judge Dolinger as abusive of all Kong's employees cannot erase the possibility of gay or HIV+ discrimination. Kong's uniform abuse of all employees would not be grounds to dismiss a lawsuit, it would be grounds for a class action lawsuit for hostile work environment and violations of human right to dignity. Even if defendant Kong had used similar behaviors against heterosexual employees, he cannot thereby 'cure' his conduct toward homosexuals. Title VII

Analysis for NYCHRL and NYSHRL purposes must consider what is offensive and hostile to a "reasonable homosexual". It should be sufficient to ground a "reasonable homosexual" standard, which renders sexual-orientation specific differences in subjective effects of identical behavior (along with, of course evidence of differences in objective quality and quantity) sufficient to ground a claim of discrimination. Both of Kong's comments to Plaintiff were emasculating and were made to no other male employee. The fact that Kong also said one of the emasculating comments to a female employee cannot 'cure' his behavior toward gay men. Many of Kong's workplace bullying tactics were not used on other employees. There is a clear difference in quantity even if defendant Kong's treatment is equally distributed; Plaintiff worked for Kong four times longer than any other employee on the team at the time of his termination. Judge Dolinger himself recognizes a difference in quality but distorts the record of Plaintiff's performance evaluations in a similar manner to defense counsel when he states "It appears that Kong particularly had issues with Williams's performance and negative attitude toward authority (which were echoed, to an extent, in performance evaluations written by others [who reported to Kong] and that Williams may have been more sensitive than others on the team toward Kong's treatment of him." For the record plaintiff has no problem with "authority", plaintiff has a problem with those entrusted with authority abusing the authority they have been entrusted with and as a cadet at Culver plaintiff was

brought up to discourage and stop witnessed abuse when and where possible. Defendant Kong is such an individual who abused the managerial authority entrusted to him. Kong had his own agenda often times not in line with the goals of the firm or at cross-purposes with the goals of the firm. The recommendation subtly implies that Plaintiff somehow "deserved" or "asked for" the acute disabling psychiatric injury he incurred. Plaintiff did not ask for nor did he deserve nor did his performance merit psychiatric injury of any kind whatsoever. Plaintiff finds Judge Dolinger's conclusions to be a disturbing violation of Title VII analysis as well as a denial of the basic human right to dignity.

Plaintiff has stated that he disagreed with many negative comments in his reviews. There is no comparable written warning for Plaintiff to the one defendant Kong received. The climate study summary states that employees do not feel that they get fair reviews [Exhibit JPMC 000555-557]. His honor ignores the all Kong controlled reviews have been impeached by Kong's written warning and climate study summary. It is clear from the transcript and the evidence presented that the Kong workplace is described by all of the "Bullying-Prone Workplace Characteristics"[22]

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[22] Bullying-Prone Workplace Characteristics:

"Making the numbers," an obsession with outcomes is uncritically adopted;

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recently published. Judge Dolinger erroneously concludes that Plaintiff's performance caused Kong's abusive behavior, and not that Kong's behavior was detrimental to Plaintiff's psychiatric state which adversely affected Plaintiff's performance. "Bullying keeps work from getting done."[23] As evident from the affidavit of Bob Fisch, Kong's bad behavior pre-existed Kong being in plaintiff's chain of command. As is evident from the written warning, Kong's bad behavior went on after plaintiff's termination. The climate study summary states under the heading of

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> Recruitment, promotion, and reward systems focus on individuals' "strength of personality" or interpersonal aggressiveness while ignoring emotional intelligence;
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> Short-term planning, e.g. to meet quarterly investor projections, governs operations;
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> Executives give higher priority to personal friendships than to legitimate business interests;
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> Fear is dominant, desired workplace emotion, whether deliberately engineered or inadvertent; and
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> Misuse of performance appraisal processes occur with impunity.

(8 Employee Rts. & Employment Pol'y J. (2004) Pg 328-329 Workplace Bullying: How To Address America's Silent Epidemic by Garie Namie & Ruth Namie)

[23] Workplace bullying is repeated interpersonal mistreatment that is sufficiently severe as to harm a targeted person's health or economic status. Further it is driven by the perpetrator's need to control others while undermining legitimate business interests. Bullying keeps work from getting done. (8 Employee Rts. & Employment Pol'y J. (2004) Pg 315 Workplace Bullying: How To Address America's Silent Epidemic by Garie Namie & Ruth Namie)

"Performance Reviews": "Employees do not feel they receive accurate/fair performance reviews", "Do not take into account his 'back and forth' direction". Plaintiff believes a reasonable juror would conclude Kong's behavior to be capricious and arbitrary and his reviews to be retaliatory.

Similar complaints contained in Kong's written warning and climate study summary dated August 2002, but not handed over until summer of 2003, are reflected in Mr. Fisch's affidavit dated February 14, 2002, Plaintiff's first amended complaint of January 2003, and Plaintiff's statement of material facts in dispute which Judge Dolinger essentially ignored. Mr. Fisch left the bank in 1998. Mr. Kong's behavior was not "something new" but had been going on for years as evident by Mr. Fisch's affidavit. Requiring Plaintiff to put up with "Defendant Kong's psychological abuse" in order to remain employed by the bank was a definite disadvantageous term or condition of employment to which others were not subjected to the degree Plaintiff was. In fact it is clear from defendant Kong's written warning that not all employees were the target of Kong's animus while all of them certainly witnessed it. "all of the employees have validated all of the above information, if they had not experienced one of this behaviors directly, they did confirm that they have witnessed them happen to others." The motives of Kong's target selection and bullying tactic selection have not been stated within the recommendation and have not yet been determined by the court, but those motives are obviously unrelated to Plaintiff's "performance" as Kong's

bullying behavior pre-existed plaintiff being on Kong's team and Kong's workplace bullying continued to exist after plaintiff's termination as a new target was selected by Kong, Hevel Jean-Baptiste a Hatian [sic] immigrant, the only African American on the team, and a member of a different high risk group for HIV "Hatians [sic]". Judge Dolinger asserts that Plaintiff "tacked his perceived disability claim onto his sexual-orientation claim, citing the same complaints as evidence . . . " [(MHD) Report-Rec. 56] On the contrary, the perceived HIV discrimination claim was one of the two original causes of action written up by attorney Denise Bonnaig and filed on May 2, 2002 approximately six weeks before the complaints of Hatian [sic] employee Hevel Jean-Baptist [sic] were made at the bank. The court has not answered the question did Kong, after having run out of gay men on his team, move on to the next HIV high risk group available "Hatians [sic]" or did Ms. Bonnaig get lucky prophesizing the future? Was the original complaint of May 2, 2002 correctly predictive or is it mere coincidence? Why did Hevel Jean-Baptiste, a member of an HIV high risk group "Hatians [sic]", who was rated the highest at the time Plaintiff was selected to be terminated become Kong's next target? Why "You saw what happened to Christian, you are next[24]"? The very statement by Kong implies that he targets selected employees and that he targeted Plaintiff. Yet Judge Dolinger inappropriately minimizes this evidence instead of viewing it in favor of

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[24] See climate study exhibit JPMC 000555.

the non-moving party. More significantly, why did HR decide to act on Hevel's complaints in such a comprehensive manner and not homosexual Plaintiffs? A possible explanation could be that the case was filed in New York State Supreme Court on May 5, 2002. Plaintiff told Hevel personally within days of that filing a good month before Hevel's complaints to HR. While the "climate study" may have been initiated in response to Hevel's complaints, Hevel's complaints could not be ignored since he knew Plaintiff's lawsuit had been filed. The affidavit of Shannon Terry leaves this fact out.

"Plaintiff, who at that time was unaware that Mr. Fisch had revealed his HIV status to Defendant Kong, responded to Employee Gayle Prescod by saying "I don't know, but it is a concern of mine," effectively putting HR on notice that Defendant Kong was suspected of being anti-gay and needed to be watched. Had Plaintiff known at the time that Mr. Fisch had told Mr. Kong his HIV status, Plaintiff would have formally charged Defendant Kong with anti-gay discrimination when meeting with Employee Gayle Prescod the first time." [Plaintiff's Statement of Material Facts in Dispute Item 70]

I believe it can be logically inferred from Mr. Fisch's affidavit that he felt driven out of the bank by defendant Kong and he felt that defendant Kong was particularly abusive to himself and Plaintiff back in 1998 when Mr. Fisch worked at the bank. As Mr.

Fisch put it: "I resigned primarily because of Mr. Raymond Kong", "In 1998 I sought and found employment elsewhere because it was evident to Plaintiff that I had no future at Chase Manhattan under Raymond Kong", "Mr. Raymond Kong's behavior toward Plaintiff was such that I grew to hate him", "I have no doubt that Mr. Raymond Kong hated me, possibly because I was gay or because of Plaintiff's HIV status." [See Docketed Exhibit I] It is also clear that defendant Kong brought about Plaintiff's termination. Concerning the statement "arguing with you is like arguing with my wife", Judge Dolinger erroneously concludes that the "fact that Kong also made the second statement to a female employee betrays Kong's equal opportunity attitude toward people who argue with him, whether gay or straight, male or female, as opposed to an expression of anti-gay bias." Incorrect, Second Amended Complaint item 73 under "Defendant Chase's Discriminatory Animus Is Demonstrated By" states "Defendant Kong's intentional pattern of malice against actual or perceived to be gay men or actual or perceived to be HIV positive men, and women". Kong's statement to both Plaintiff and the former female team member Nancy Schuman is a reflection that he treats gay men ("sissies") and women in the same discriminatory derogatory manner. It is in no way shape or form an indicator of "equal opportunity anything". Judge Dolinger's dismissive attitude of such an emasculating heterosexist male chauvinist statement is disturbing. Judge Dolinger has inappropriately reduced the event of the statement, the denial of appropriate tools by Kong

that other teams were using, and Kong's banning of Plaintiff from programming in PERL all at the same time to the statement alone when it was a comprehensive act of abuse not in line with the customer focus or goals of the firm, and which undercut Plaintiff's ability to appropriately solve problems for customer and the LOPS team in an ongoing basis, and which was also individually and collectively psychologically abusive. It is not managerial prerogative to thwart the goals of the firm or to psychologically abuse employees. It is not judicial prerogative to thwart the law.

Judge Dolinger errs in that he looks for sexual orientation specific conduct and not for a difference in subjective effects or objective quality or objective quantity. Disabling Acute Complex PTSD is a very clear and extreme subjective effect Plaintiff incurred different from all other employees. The conduct in question was constant over a period of nearly 4 years which is 4 times as long as the next employee on Defendant Kong's team at the time. Even if Kong's abuse were evenly distributed Plaintiff would still have received over 4 times the abuse as any other employee on the team at the time of Plaintiff's termination. The protracted time alone represents a definite quantitative difference. Judge Dolinger has recognized a qualitative difference in the disconnect of the selection process and the fact that Plaintiff became psychologically injured to the point where "Kong's very presence appeared to turn his work environment hostile" [(MHD) Report-Rec. 59] but his

honor inappropriately refuses to call it such in his recommendation. Together the duration and severity level were sufficient to cause acute psychiatric injury and meets the "varying inversely" rule; Judge Dolinger does not apply this rule appropriately in Plaintiff's case. Judge Dolinger appears to recognize that Plaintiff's psychiatric injury was developing, but does not state so in his favor. His honor states: "Williams may have been more sensitive than others on the team to Kong's treatment of him." [(MHD) Report-Rec. 35] His honor recognized that Plaintiff was "hypersensitive" a symptom of his then developing PTSD but does not state that fact in Plaintiff's favor. Judge Dolinger fails to recognize that Kong's environment was a constant chronic workplace stressor.[25]

Judge Dolinger erroneously concludes that "the fact that the record is blank as to any complaints by him [Plaintiff] or any one else linking Kong's management style with anti-gay bias underscores the

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[25] Workplace bullying is considered to be a chronic workplace stressor. While the nature and range of its effects are similar to other types of workplace stressors such as role conflict, role ambiguity, and role overload, workplace bullying may be especially destructive because unlike these role stat stressors, targets are more likely to view this mistreatment as not inherent in the demands of the job and hence, unnecessary. Indeed, exposure to bullying behaviors has been found to account for variability in various outcome variables beyond that accounted for by the role stat stressors attesting to tits [sic] unique stature. (8 Employee Rts. & Employment Pol'y J. (2004) Pgs. 345 Bullying In The Workplace: Its Impact and Management by Loraleigh Keashly and Joel H. Neuman)

absence of concrete evidence that Kong's treatment of him – as distinct from his apparent mistreatment of others under his aegis – was motivated by homophobia." [(MHD) Report-Rec. 50-51]. Incorrect, a "lack of complaints" is still evidence, and is a sign of a "climate of silence", an organizational climate that effectively promotes mistreatment and creates an atmosphere that discourages employees from speaking out, and characterized by employee beliefs that it is not worth the effort to speak up and that voicing opinions or concerns is dangerous[26].

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[26] Based on interviews with victims, Keashly noted that organizational responding takes two forms: 1) actions reflecting the organization taking responsibility for dealing with the bullying situation (e.g. moving the victim, disciplining or firing the bully) and 2) actions reflecting that the target is responsible for managing the situation (doing nothing, minimizing the complaint, attributing the issue to "personalities," blaming or retaliating against the victim). The latter set of responses will inhibit employee reporting. Such organizational responding also does not bode well for protecting an employee from retaliation on the part of the bully, which is another reason often given for not reporting.

This discussion or organizational tolerance and responding speaks to the broader issue of the link between organizational climate and workplace bullying. Several authors have argued that there are organizational climates that effectively promote mistreatment and create an atmosphere that discourages employees from speaking out about such mistreatments. For example, Ryan and Oestreich speak of "undiscussables" and a climate of fear. Morrison and Milliken identify climates of silence, which are characterized by employee beliefs that it is not worth the effort to speak up and that voicing opinions or concerns is dangerous. Under-reporting of bullying would be

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"I did not feel that it would have been politically good for me to make such charge either before I – while I was still on my team, basically. I mean, everything I had done up to that point, I felt the bank had allowed Raymond Kong to retaliate against me and retaliate against me, so I mean, to stick my neck out further and say, "You're discriminating against me because I'm gay," I just did not see the bank's policies and procedures, reactions, pattern of all of the above which I observed to be conducive to that. I just felt that doing that would be committing JP Morgan suicide." [TR#2 91:4-16]

Judge Dolinger erroneously concludes the problem between Plaintiff and defendant Kong to be "personality conflict" instead of "psychological abuse" via workplace bullying.[27] Judge Dolinger makes a fundamental

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normative in such organizations. (8 Employee Rts. & Employment Pol'y J. (2004) Pgs. 356-357 Bullying In The Workplace: Its Impact and Management by Loraleigh Keashly and Joel H. Neuman)

[27] WBTI [Workplace Bullying & Trauma Institute] research shows that half of all bullying is woman-on-woman. Unless the target enjoys protected status based on race, ethnicity, religion or disability, it is not likely that current laws provide the target with legal redress. Without laws, employers are reluctant to recognize, let alone correct or prevent destructive behavior, preferring to minimize it as "personality clashes." (8 Employee Rts. & Employment Pol'y J. (2004) Pg 325 Workplace Bullying: How To Address America's Silent Epidemic by Garie Namie & Ruth Namie)

attribution error by blaming the victim, the Plaintiff.[28] Judge Dolinger fails to recognize that the lack of appropriate response of other defendants and HR to Plaintiff's complaints about Kong were also severely damaging to Plaintiff.[29] Judge Dolinger fails to

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[28] A human tendency to blame the victims for the abuse they endure, committing the fundamental attribution error. Observers tend to overestimate the explanatory power of personality relative to the comparatively pallid role of invisible "work environment" when attempting to understand why bullying occurs. Bullies who employ subtle, undetectable techniques are invisible while targets' actions are seen. Targets therefore, are held responsible while bullies are not. Mental health and legal professionals are sometimes guilty of making this perceptual mistake. The phenomenon is not restricted to bullying. It also operates in cases of rape and domestic violence." (Id Pg 331)

[29] The 'hear no evil' representatives evidenced a basic misunderstanding of bullying, labeling the experiences as "personality conflict". They acknowledged that conflict existed, but held both parties responsible, often 'blaming the victim' for having the kind of personality that irritated the bully. Most frequently, the representatives told the parties to sort it out themselves, outside of work time. Another common reaction was to deny that the situation was relevant to the organization because the behaviours did not fall under protected grounds (e.g. sexual or racial harassment) as specified by human rights legislation, again suggesting a basic misunderstanding of bullying.

Referral to the EAP and mediation constituted the assistance offered in these organisations. Unfortunately, mediation was frequently unsuccessful due to power differentials between the employee and the bully, inexperience on the part of the person conducting the mediation, and lack of understanding of the differences between bullying and interpersonal conflict. Extensive counseling was often required to help the employee cope with the lack of help or the failed mediation.

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recognize that defendants did not enforce their own policies and procedures with regard to Plaintiff's complaints about Kong.[30] Judge Dolinger states

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Organisational representatives engaging in this type of response were most frequently from larger organisations and typically from a government organisation or educational institution. Organisational culture was typically rule oriented and bureaucratic.

I observed this response to be the most damaging response to employees because these organisations tended to have a surface presentation that led the employee to believe that the organisation valued respectful workplaces. Employees expected the organisational representatives to intervene in the bullying situation and to ensure that they experienced respect at work. They also expected the representatives to implement non-harassment and respectful workplace policies. When this was not forth coming, the employees expressed feelings of betrayal. Employees from these types of organisations tended to look toward legal action once they understood they would not receive active support from their organisation. They required the longest term of counseling of any response type. [Vol 32, No.3 British Journal of Guidance & Counselling, August 2004 Pgs 391-392 A Preliminary Typology of Organisational Response to Allegations of Workplace Bullying: See no evil, hear no evil, speak no evil by Patricia Ferris, Department of Industrial Organisational Psychology, University of Calgary]

[30] "Bullied targets in American workplaces face tremendous challenges to stop their bullying. Few companies have human resources policies to address harassment in addition to the discriminatory variety. Even fewer companies faithfully enforce the policies mandating "respect". Complainants are not believed by senior management. Employee assistance program counselors can help with worker's emotional fallout, but they work for employers and have conflicted loyalties. U.S. unions have shown some interest but current struggles for survival preclude involvement with bullying as a worklife quality campaign. Bullying marginalizes targets. Targets are left to fight for

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"Williams, who approached numerous bank employees in an effort to solicit affidavits to support his case (Tr. #1: 130), provided no evidence that would raise an issue of material fact that other team members heard Kong make any anti-gay references regarding him, his termination, or any other capacity." Judge Dolinger erroneously requires anti-gay references which are not required to pass appropriate Title VII analysis, and ignores the extreme difference in subjective effects on Plaintiff. Judge Dolinger distorts the meaning of what the transcript says in the same manner that defense counsels have distorted it.

"I asked a lot of people to give me affidavits. Most people didn't want to get involved in any of this stuff. Okay. And I grew up where, you know, if someone asked you to do something, you know, and you know, it has to do with just telling the truth, you do it. Okay. That's the way I was brought up. I mean the Culver code of a cadet is "I will not lie cheat or steal, and I will discourage others from such actions." Not being straightforward is tantamount to lying in the kind of upbringing I was brought up in. [TR #1 130:10-21]

A.. What surprises me about this is that – is that he [Bob Fisch] did it [gave Plaintiff an

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themselves." (8 Employee Rts. & Employment Pol'y J. (2004) Pg 317 Workplace Bullying: How To Address America's Silent Epidemic by Garie Namie & Ruth Namie)

affidavit], and that he was happy to do it for me.

Q.. That Bob Fisch, that he filed the affidavit?

A.. Yes. And that he was happy to do it for me, and that he hates Raymond Kong so much still.

Q.. But again, to your knowledge, Robert Fisch does not have any litigation pending against the bank or against Raymond Kong?

A.. No, no, no, no, no, he does not. This was taken before I was diagnosed with acute PTSD. At the same time, I know he was seeing a shrink [psychiatrist] because he told me that. And I don't know – I know he – I don't know if he has been diagnosed with some sort of stress disorder or not. [TR #1 131:12-17]

Assuming Judge Dolinger is correct about Plaintiff's IIED and NIED claims and workman's compensation law, then this is yet another reason to sue Plaintiff's former attorney for legal malpractice, and another reason why Judge Daniels should not have ignored the Cross-Motion to remove Ms. Bonnaig for cause. However, Plaintiff believes Judge Dolinger totally inappropriately ignores Plaintiff's arguments with regard to IIED and NIED. More specifically Workmen's Compensation exists for "Accidental Injuries" not "Intentional Injuries caused by the intentional acts of an employee." (See Manning v. Utilities Mut. Ins. Co. 1999 WL 782569) *4 The exclusivity provision of the **WCL** has never been intended to **shield**

an **employer** from **liability** for **intentional injuries**. *See Workers' Compensation Law* § 2. Thus it does not bar an employee from bringing a tort action against his **employer** or its insurance carrier for such wrongs. *See Jones v. State of New York 33 N.Y.2d 275, 352 N.Y.S.2d 169 (1973)*; *see also Werner v. State of New York, 53 N.Y.2d 346, 441 N.Y.S.2d 654 (1981).* Thus, the Court has jurisdiction to hear this **intentional** tort claim.

Further: **"Injury"** and "personal **injury**" for the purposes of the **WCL** are defined in *Section 2(7)* to " . . . mean only accidental **injuries** arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result there from."

Plaintiff's "Acute" Psychiatric Injury was not unavoidable and was not accidental. Defendants Rutter, Bibb, Ford, Shefferd and Chase needed only to enforce the Bank's existing policies and procedures which would have detected Kong's intentionally abusive behavior and have corrected it. Such correction did not occur until months after Plaintiff filed his complaint (See JPMC 000555-557).

In other words, New York's Workmen's Compensation Law does not apply because "Disabling acute psychiatric injury" is not a natural and unavoidable consequence arising out of and in the course of employment at a bank, and because Plaintiff's disabling acute psychiatric injury was caused by the intentional workplace bullying acts of defendant Kong. The

Negligence of the other Defendants was not mere "Negligence" but "Recklessly Wanton Indifferent Negligence". Plaintiff's psychiatric injury was the causal effect of Kong's workplace bulling [sic]. The other defendants and HR turned a blind eye to Kong's behavior over a period of years, and that engages their responsibility. It is therefore actionable in Plaintiff's Intentional Tort.[31]

The nature of true intentional infliction of emotional distress is that it is often covert and insidious. Therefore it is a false test of true "intentional infliction of emotional distress" to look only for overt and blatant behaviors, and not covert and insidious behaviors. This is especially true when the behavior of a manager is linked to psychiatric injury of an employee that is so severe he is disabled under the law, and violations of policy and procedure by the managers and HR, and where the employer has either been negligent or made a decision to turn a blind eye to a harassment situation as in the case of Plaintiff. It is also a false test to require that the environment be so bad that the employee quit. That false test erroneously assumes that the employee is not already sufficiently psychiatrically injured such

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[31] "A favored tort theory for seeking relief against emotionally abusive treatment at work has been intentional infliction of emotional distress ("IIED"), but the way in which the courts have greeted these claims demonstrates, more than any other cause of action, the legality of cruelty." (8 Employee Rts. & Employment Pol'y J. (2004) Pg 484-485 Crafting a Legislative Response to Workplace Bullying by David C. Yamada)

that s/he can quit. It erroneously assumes that an employee will quit before s/he becomes violent against a bullying manager. It ignores the myriad of factors that affect an employee's decision to quit: desire to stay at company but not work for the bullying manager, sense of responsibility toward customers and coworkers, economic necessity, state of other jobs in the current economy, lack of knowledge about the psychiatric risk or economic risk of staying put, degree to which the employee is already psychiatrically damaged and already feeling they are in a captive situation, the need to prove oneself to those who have believed the bully's slander. Requiring an employee to quit in order to prove IIED or hostile work environment is a false test because the environment can be so insidiously hostile and damaging that the employee is no longer psychologically capable of quitting. There appears to be no supporting scientific basis for the current legal test for IIED, while there is significant scientific evidence against it. Plaintiff therefore formally challenges as fundamentally flawed current Title VII IIED and hostile work environment analysis, and contends that workplace bullying that caused severe psychiatric injury ought to always pass a corrected Title VII test for both IIED and hostile work environment. Plaintiff formally ask [sic] the court to take appropriate pragmatic action and come up with a new and corrected standard test that reflects the currently evolved knowledge of harassment, hostile work environment, organizational behavior, workplace bullying, and the typology

of organizational response to allegations of "workplace bullying".

Judge Dolinger errs in that he exonerates Kong's behavior because all employees had issues with Kong's behavior, as any ethical employee should. However Kong's written warning states quite clearly "all of the employees have validated all of the above information, if they had not experienced one of these behaviors directly, they did confirm that they have witnessed them happen to others." Evidently not all employees were targets of all of Kong's behaviors, but all were witness to it. There is some sort of differentiation made by Kong in his target selection, yet the recommendation fails to state what the differentiating motive(s) is(are). Judge Dolinger fails to consider the extreme difference in subjective effects on Plaintiff [sic] acute complex PTSD, inappropriately minimizes the difference in subjective quality of Kong's behavior toward Plaintiff, and ignores the difference in objective quantity. At the same time Judge Dolinger recognizes some sort of qualitative difference in that he states "There does appear to be a disconnect between the selection criteria listed on the template against which the four candidates for the new team were evaluated – which were solely experience based – and Kong's evaluation of Williams. That assessment was more based on Williams negative attitude than on his experience which clearly outpaced the other candidates." [(MHD) Report-Rec. 45-46] "Kong still played a substantial role in the decision-making process, as the management's decision not to hire

Williams on the new FX Systems team was based upon his recommendation." [(MHD) Report-Rec. 45-46] Judge Dolinger errs in that he fails to recognize organizational behavior that "silence makes sense in a fear-plagued environment where people are unsure if they next will be targeted."[32] Judge Dolinger errs in that he fails to recognize that J.P. Morgan Chase Human Resources had known about defendant Kong's abusive environment for years and did nothing about it. Judge Dolinger further errs in that he fails to understand why they likely did nothing about it.

"data to prevent bullying-related losses exist. Because the complaint system gatekeepers (in HR) hear all the stories, the employer has evidence of the prevalence of bullying. Everyone knows who are the repeat offenders. Nothing is now done because of the gap in the law that would compel employers to correct and prevent an abusive work environment.[for all employees]"[33]

The gap is that the law in New York State is not "status blind", unlike its bordering neighbor the Canadian Province of Quebec where the law is "status blind" and no "discriminatory animus" proof

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[32] 8 Employee Rts. & Employment Pol'y J. (2004) Pg 324 Workplace Bullying: How To Address America's Silent Epidemic by Garie Namie & Ruth Namie

[33] 8 Employee Rts. & Employment Pol'y J. (2004) Pg 327 Workplace Bullying: How To Address America's Silent Epidemic by Garie Namie & Ruth Namie

is required for legal redress of Workplace Bullying and Psychological Abuse at work. The negative affect [sic] of J.P. Morgan Chase HR's behavior is that discrimination must rise to a level of overt and blatant observability by others before HR will take appropriate action. Such behavior by any HR department is not only bad because it permits the vast majority of discrimination and hostile work environments to continue unabated it is also very dangerous and may result in violence between the target employee and the bullying manager. The recommendation inappropriately minimizes the evidence referring to discriminatory animus against Plaintiff: "Discriminatory Comments – Race/Sexual Orientation" heading, Shannon Terry noted "References Christian Williams." "As the person who conducted the Climate Study and investigated the matter, Terry explained this passing reference as based solely upon the speculation of team members who knew that Williams was gay and that his job had been eliminated, and who therefore assumed that his sexual orientation may have had something to do with his termination." (See Terry Aff., par 12 dated August 2004 subsequent to the filing for the response to the Motion for Summary Judgment). Judge Dolinger fails to understand that the most that employees currently working for Kong could possibly say to Shannon Terry given their circumstance, environment, and potential targethood, was that they assumed Plaintiff's termination was related to his being gay. The assertion by defendants that they were unaware of a discrimination situation cannot relieve them of their responsibility. On the

contrary, the employer's negligence or decision to turn a blind eye to a harassment situation engages their responsibility.

What the Experts are Saying:

How can a problem so prevalent not trigger societal outrage? Silence by targeted persons is understandable because shame stems from being controlled and humiliated. Co-workers' silence makes sense in a fear-plagued environment where people are unsure if they next will be targeted.

More puzzling is the typical employer response in light of extant internal anti-harassment and anti-violence policies. In the WBTI surveys, respondents described the nature of support, or lack thereof, or lack of it, provided by others at work. Targets who had reported the abusive misconduct to the perpetrator's (bully's) manager and had asked for relief elicited positive, helpful responses in only 18 percent of cases. In 42 percent of the instances, the bully's boss actually compounded the problem. And in 40 percent of cases, the boss did nothing, which is not a neutral response after help was explicitly requested. Human Resources (HR) and anti-discrimination officers were similarly unhelpful: 17 percent took positive steps to the bullying, 32 percent reacted negatively, and 51 percent did nothing. (8 Employee Rts. & Employment Pol'y J. (2004)

Pg 324 Workplace Bullying: How To Address America's Silent Epidemic by Garie Namie & Ruth Namie)

Comprehensive, on-site studies designed to reveal the prevalence of serious work environment problems are needed. But employers are reluctant to address serious, health-impairing bullying regardless of its name. Just as targeted individuals are shamed in the process, employers seem ashamed to admit that they have taken steps to correct and prevent bullying. To us, taking proactive steps is something for which credit is deserved. However, timid executives worry that if they adopt solutions for bullying, they will indicate that a problem exists, making themselves legally liable. (Id Pg 319)

The series of humiliations traumatized individuals endure to "convince" employers, Workers Compensation and disability insurance systems is unimaginable to people never bullied at work. Complainants are treated as frauds. In fact, the burden of proof falls on targets rather than perpetrators. In contrast, no such assumptions are invoked in cases of workplace homicide; all blame is rightly assigned to the perpetrator. Bullying is sub-lethal violence.

Targets of workplace bullying endure an average of twenty-two months of exposure. The attribute common to all targets is that they are

unwilling or unable to react to unwarranted aggression with aggression. Research and anecdotal evidence show that it is the perpetrators who escalate their tyrannical misconduct when they feel threatened by, and react in response to, targets' asserted independence, ethnical [sic] **and social skills or ethical whistle blowing. Targets do not seek to be tormented any more than sexual harassment targets invite undesirable assaults or domestic violence victims seek to be beaten or verbally abused. (Id Pg 320)**

Since bully attacks can be subtle and insidious, it is not simply one event that is frightening or threatening. Rather, targets are slowly exposed to cumulative events that are intended to undermine their confidence. (Id. Pg 323)

Trauma experienced by bullied targets is caused by work, by an intentional, systematic campaign launched by one or more people against a target just as a battering spouse causes harm to the victim. (Id. Pg 325)

The juxtaposition of the espoused political maxim of "personal responsibility" with the actual record of failing to hold accountable hyper-aggressive, destructive individuals. This is the blame-the-victim barrier. Bullies with managerial or executive rank rarely suffer negative consequences. (Id. Pg 332)

[P]ersonal fealty and patronage is worth more than legitimate business interests. An illegitimate bully manager can harm others with impunity as long as she or he has an executive sponsor. Bullying is the litmus test for executive integrity and organizational courage. (Id. Pg 332)

In Summary:

Irrespective of the reasons for Kong's behavior, it is unchallenged medical evidence that defendant Kong's behavior was sufficiently psychologically abusive to cause and did cause Plaintiff's disabling acute psychiatric injury. The court is required to view this evidence in the most favorable light for the non-moving party, the Plaintiff. Therefore the court is required to conclude on summary judgment that Kong's workplace was a hostile work environment because it was sufficiently hostile to cause acute psychiatric injury in Plaintiff disabling him under the law. The court has failed to understand the difference between legitimate management decisions, and hostile workplace bullying harassment. Plaintiff would like to remind the court that "the 'legislative history' of the **NYCHRL** makes clear that it is to be even more liberally construed than the federal and state anti-discrimination laws,"[34] that defendant

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[34] Viruet v. citizen Advice Bureau No. 01 CIV. 4594 AIR (Cite As 2002 WL 1880731 (S.D.N.Y.) As this Court has pointed out several times, "while the cases . . . employ the same 'federal' analysis to **NYCHRL** claims, **the 'legislative history' of the**

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Kong's workplace environment was sufficiently hostile to disable Plaintiff under the law, that defendants did not respond appropriately in any way to curb Kong's behavior until after the lawsuit was filed, and after a "heterosexual" employee complained of Kong's behavior, and that Under Title VII, no affirmative defense is available to an employer on an employee's claim of vicarious liability for an actionable hostile environment created by a supervisor when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. Civil Rights Act of 1964, § 703(a)(1),.

Genuine issues of material fact as to whether defendants alleged conduct of blaming the Plaintiff, making unreasonable job demands, unfairly criticizing the ability of the Plaintiff, inconsistent and noncompliance with the policies and procedures of the bank, threats of job loss, use of insults and putdowns, discounting and denying the accomplishments of the Plaintiff, exclusion "icing out" of the Plaintiff, yelling and screaming, stealing credit for Plaintiffs work, and abuse of performance reviews, acts which were unrelated to legitimate business interests, or counter

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NYCHRL makes clear that it is to be even more liberally construed than the federal and state anti-discrimination laws." (Peck, M.J.); *accord, e.g., Kennebrew v. New York City Hous. Auth.*, 01 Civ. 1654, (Peck, M.J.) (quoting *Burger v. Litton*, 91 Civ. 0918, (Peck, M.J.), (Knapp, D.J.)); (Wood, D.J. & Peck, M.J.); *Hernandez v. New York City Law Dep't Corp. Counsel*, 94 Civ. 9042, (Peck, M.J.); *see also* (quoting *Burger*), *cert. denied*,

productive to legitimate business interests, or arbitrary, or capricious, or had cross-purposes extraneous to legitimate business interests, and which were also psychologically abusive and caused Plaintiff to incur acute psychiatric injury disabling him under the law pursuant to the tenants [sic] of Social Security Rulings 85-15 and 98-8p, individually or collectively constitute harassment, hostile work environment, IIED and NIED. Plaintiff believes the court should find that management decisions as described above are individually and/or collectively illegitimate management decisions, harassment, a hostile work environment, IIED, and NIED.

Genuine issues of proper and appropriate Title VII and other legal analysis based on current evolved knowledge of "legitimate versus illegitimate management decisions", harassment, hostile work environment, organizational behavior, typology of organizational response to allegations of workplace bullying, comparative law, and IIED/NIED analysis preclude summary judgment in favor of defendants.

Genuine issues of material fact as to whether defendant Kong's conduct of workplace bullying tactics with little or no provocation which caused Plaintiff's disabling acute psychiatric injury was motivated by Plaintiff's sexual orientation or perceived HIV status preclude summary judgment in favor of defendants.

Genuine issues of material fact as to whether defendant Kong's conduct of workplace bullying

tactics with little or no provocation which caused Plaintiff's acute psychiatric injury a severe subjective effect to which no other employee incurred was quantitatively or qualitatively different than defendant Kong's conduct toward heterosexual employees who did not incur psychiatric injury, and whether such conduct was sufficiently severe or serious to constitute a hostile work environment preclude summary judgment in favor of defendants. The court should hold that evidence of extreme differences in subjective effects (along with, of course evidence of differences in objective quality and quantity) is relevant to determining whether or not homosexuals and heterosexuals were treated differently, even where the conduct is not facially sex – or sexual orientation specific. It is a debatable question as to the objective difference in treatment of homosexual Plaintiff and heterosexual employees. The evidence strongly suggests that difference in subjective effects were very different for homosexual Plaintiff and heterosexuals. A few instances of hostile behavior toward heterosexual male employees – which the record suggest [sic] may have had a qualitatively different, "bantering" character (they were not emasculating comments) do not erase the possibility that a reasonable jury might find that the pattern of abuse directed at homosexual male employees was discriminatory. Accordingly Plaintiff asks the court to reject summary judgment in favor of defendants and move forward with schedule for a joint pre-trial statement and preparations for trial.

DATED: November 21, 2005

NEW YORK, NEW YORK

CHRISTIAN E. WILLIAMS, PRO SE

By: /s/ Christian E. Williams

CHRISTIAN E. WILLIAMS
[Address, phone, fax and email omitted in printing.]

[Personally appeared before me Christian Williams this 21st day of November, 2005 and signed this Document.]

/s/ Tarek Morsy

[SEAL]	TAREK MORSY Notary Public State of New Jersey My Commission Expires Jun 29, 2010

APPENDIX J

[SEAL] New York State
ASSEMBLY Sheldon Silver – Speaker

Monday, May 12, 2008

Bill Text – A10291

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See Bill Summary

STATE OF NEW YORK

10291

IN ASSEMBLY

March 17, 2008

Introduced by M. of A. ENGLEBRIGHT – read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to establishing a private cause of action for an abusive work environment

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The labor law is amended by adding a new article 20-D to read as follows:

ARTICLE 20-D
ABUSIVE WORK ENVIRONMENT

SECTION 760. LEGISLATIVE FINDINGS AND INTENT.
761. DEFINITIONS.
762. ABUSIVE WORK ENVIRONMENT.
763. EMPLOYER LIABILITY.
764. DEFENSES.
765. RETALIATION.
766. REMEDIES.
767. ENFORCEMENT.
768. EFFECT OF OTHER LAWS.

S 760. LEGISLATIVE FINDINGS AND INTENT. THE LEGISLATURE HEREBY FINDS THAT THE SOCIAL AND ECONOMIC WELL-BEING OF THE STATE IS DEPENDENT UPON HEALTHY AND PRODUCTIVE EMPLOYEES. SURVEYS AND STUDIES HAVE DOCUMENTED THAT BETWEEN 16 AND 21 PERCENT OF EMPLOYEES DIRECTLY EXPERIENCE HEALTH ENDANGERING WORKPLACE BULLYING, ABUSE AND HARASSMENT. SUCH BEHAVIOR IS FOUR TIMES MORE PREVALENT THAN SEXUAL HARASSMENT. THESE SURVEYS AND STUDIES HAVE FURTHER FOUND THAT ABUSIVE WORK ENVIRONMENTS CAN HAVE SERIOUS EFFECTS ON THE TARGETED EMPLOYEES, INCLUDING FEELINGS OF SHAME AND HUMILIATION, STRESS, LOSS OF SLEEP, SEVERE ANXIETY, DEPRESSION, POST-TRAUMATIC STRESS DISORDER, REDUCED IMMUNITY TO INFECTION, STRESS-RELATED

GASTROINTESTINAL DISORDERS, HYPERTENSION, AND PATHOPHYSIOLOGIC CHANGES THAT INCREASE THE RISK OF CARDIOVASCULAR DISEASES.

FURTHERMORE, THE LEGISLATURE FINDS THAT ABUSIVE WORK ENVIRONMENTS CAN HAVE SERIOUS CONSEQUENCES FOR EMPLOYERS, INCLUDING REDUCED EMPLOYEE PRODUCTIVITY AND MORALE, HIGHER TURNOVER AND ABSENTEEISM RATES, AND SIGNIFICANT INCREASES IN MEDICAL AND WORKERS' COMPENSATION CLAIMS.

THE LEGISLATURE HEREBY FINDS THAT UNLESS MISTREATED EMPLOYEES HAVE BEEN SUBJECTED TO ABUSIVE TREATMENT IN THE WORKPLACE ON THE BASIS OF RACE, COLOR, SEX, NATIONAL ORIGIN OR AGE, SUCH EMPLOYEES ARE UNLIKELY TO HAVE LEGAL RECOURSE TO REDRESS SUCH TREATMENT.

THE LEGISLATURE HEREBY DECLARES THAT LEGAL PROTECTION FROM ABUSIVE WORK ENVIRONMENTS SHOULD NOT BE LIMITED TO BEHAVIOR GROUNDED IN A PROTECTED CLASS STATUS AS REQUIRED BY EMPLOYMENT DISCRIMINATION STATUTES. EXISTING WORKERS' COMPENSATION PROVISIONS AND COMMON LAW TORT LAW ARE INADEQUATE TO DISCOURAGE SUCH ABUSIVE CONDUCT AND PROVIDE ADEQUATE REDRESS

TO EMPLOYEES WHO HAVE BEEN HARMED BY ABUSIVE WORK ENVIRONMENTS.

THE PURPOSE OF THIS ACT SHALL BE TO PROVIDE LEGAL REDRESS FOR EMPLOYEES WHO HAVE BEEN HARMED PSYCHOLOGICALLY, PHYSICALLY OR ECONOMICALLY BY BEING DELIBERATELY SUBJECTED TO ABUSIVE WORK ENVIRONMENTS; AND TO PROVIDE LEGAL INCENTIVES FOR EMPLOYERS TO PREVENT AND RESPOND TO MISTREATMENT OF EMPLOYEES AT WORK.

S 761. DEFINITIONS. AS USED IN THIS ARTICLE, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

1. "ABUSIVE CONDUCT" MEANS CONDUCT, WITH MALICE, TAKEN AGAINST AN EMPLOYEE BY AN EMPLOYER OR ANOTHER EMPLOYEE IN THE WORKPLACE, THAT A REASONABLE PERSON WOULD FIND TO BE HOSTILE, OFFENSIVE AND UNRELATED TO THE EMPLOYER'S LEGITIMATE BUSINESS INTERESTS. IN CONSIDERING WHETHER SUCH CONDUCT IS OCCURRING, THE TRIER OF FACT SHOULD WEIGH THE SEVERITY, NATURE AND FREQUENCY OF THE CONDUCT. ABUSIVE CONDUCT SHALL INCLUDE, BUT NOT BE LIMITED TO, REPEATED INFLICTION OF VERBAL ABUSE, SUCH AS THE USE OF DEROGATORY REMARKS, INSULTS AND EPITHETS; VERBAL OR PHYSICAL CONDUCT THAT A REASONABLE PERSON WOULD FIND THREATENING,

INTIMIDATING OR HUMILIATING; OR THE GRATUITOUS SABOTAGE OR UNDERMINING OF AN EMPLOYEE'S WORK PERFORMANCE. A SINGLE ACT SHALL NOT CONSTITUTE ABUSIVE CONDUCT, UNLESS THE TRIER OF FACT FINDS SUCH ACT TO BE ESPECIALLY SEVERE OR EGREGIOUS.

2. "ABUSIVE WORK ENVIRONMENT" MEANS A WORKPLACE IN WHICH AN EMPLOYEE IS SUBJECTED TO ABUSIVE CONDUCT THAT IS SO SEVERE THAT IT CAUSES PHYSICAL OR PSYCHOLOGICAL HARM TO SUCH EMPLOYEE.

3. "CONDUCT" MEANS ALL FORMS OF BEHAVIOR, INCLUDING ACTS AND OMISSIONS TO ACT.

4. "CONSTRUCTIVE DISCHARGE" MEANS ABUSIVE CONDUCT AGAINST AN EMPLOYEE THAT CAUSES SUCH EMPLOYEE TO RESIGN FROM HIS OR HER EMPLOYMENT WHERE (A) PRIOR TO RESIGNING, THE EMPLOYEE PROVIDES NOTICE TO THE EMPLOYER THAT AN ABUSIVE WORK ENVIRONMENT EXISTS, AND (B) THE EMPLOYER, AFTER RECEIVING NOTICE THEREOF, FAILS TO ELIMINATE THE ABUSIVE CONDUCT.

5. "MALICE" MEANS THE INTENT TO CAUSE ANOTHER PERSON TO SUFFER PSYCHOLOGICAL, PHYSICAL OR ECONOMIC HARM, WITHOUT LEGITIMATE CAUSE OR JUSTIFICATION. MALICE MAY BE INFERRED FROM THE

PRESENCE OF FACTORS SUCH AS OUTWARD EXPRESSIONS OF HOSTILITY, HARMFUL CONDUCT INCONSISTENT WITH AN EMPLOYERS LEGITIMATE BUSINESS INTERESTS, A CONTINUATION OF HARMFUL AND ILLEGITIMATE CONDUCT AFTER A COMPLAINANT REQUESTS THAT IT CEASE OR DISPLAYS OUTWARD SIGNS OF EMOTIONAL OR PHYSICAL DISTRESS IN THE FACE OF THE CONDUCT, OR ATTEMPTS TO EXPLOIT THE COMPLAINANTS KNOWN PSYCHOLOGICAL OR PHYSICAL VULNERABILITY.

6. "NEGATIVE EMPLOYMENT DECISION" MEANS A TERMINATION, CONSTRUCTIVE DISCHARGE, DEMOTION, UNFAVORABLE REASSIGNMENT, REFUSAL TO PROMOTE OR DISCIPLINARY ACTION.

7. "PHYSICAL HARM" MEANS THE MATERIAL IMPAIRMENT OF A PERSON'S PHYSICAL HEALTH OR BODILY INTEGRITY, AS DOCUMENTED BY A COMPETENT PHYSICIAN OR SUPPORTED BY COMPETENT EXPERT EVIDENCE AT TRIAL.

8. "PSYCHOLOGICAL HARM" MEANS THE MATERIAL IMPAIRMENT OF A PERSON'S MENTAL HEALTH, AS DOCUMENTED BY A COMPETENT PHYSICIAN OR SUPPORTED BY COMPETENT EXPERT EVIDENCE AT TRIAL.

S 762. ABUSIVE WORK ENVIRONMENT. IT SHALL BE UNLAWFUL TO SUBJECT AN EMPLOYEE TO AN ABUSIVE WORK ENVIRONMENT.

S 763. EMPLOYER LIABILITY. AN EMPLOYER SHALL BE CIVILLY LIABLE FOR THE EXISTENCE OF AN ABUSIVE WORK ENVIRONMENT WITHIN ANY WORKPLACE UNDER ITS CONTROL.

S 764. DEFENSES. 1. IT SHALL BE AN AFFIRMATIVE DEFENSE TO A CAUSE OF ACTION FOR ABUSIVE WORK ENVIRONMENT, THAT THE EMPLOYER EXERCISED REASONABLE CARE TO PREVENT AND PROMPTLY CORRECT THE ABUSIVE CONDUCT WHICH IS THE BASIS OF SUCH CAUSE OF ACTION AND THE PLAINTIFF UNREASONABLY FAILED TO TAKE ADVANTAGE OF THE APPROPRIATE PREVENTIVE OR CORRECTIVE OPPORTUNITIES PROVIDED BY SUCH EMPLOYER. SUCH AFFIRMATIVE DEFENSE SHALL NOT BE AVAILABLE TO AN EMPLOYER WHEN THE ABUSIVE CONDUCT CULMINATES IN A NEGATIVE EMPLOYMENT DECISION WITH REGARD TO THE PLAINTIFF.

2. IT SHALL BE AN AFFIRMATIVE DEFENSE TO A CAUSE OF ACTION FOR ABUSIVE WORK ENVIRONMENT, THAT THE EMPLOYER MADE A NEGATIVE EMPLOYMENT DECISION WITH REGARD TO THE PLAINTIFF WHICH IS CONSISTENT WITH SUCH EMPLOYER'S LEGITIMATE BUSINESS INTERESTS, SUCH AS TERMINATION OR DEMOTION BASED ON THE PLAINTIFFS POOR PERFORMANCE OR THE COMPLAINT IS BASED PRIMARILY UPON THE EMPLOYER'S REASONABLE INVESTIGATION OF

POTENTIALLY DANGEROUS, ILLEGAL OR UNETHICAL ACTIVITY.

S 765. RETALIATION. ANY RETALIATORY ACTION AGAINST ANY EMPLOYEE ALLEGING A VIOLATION OF THIS ARTICLE SHALL BE DEEMED TO BE A RETALIATORY PERSONNEL ACTION AS PROHIBITED BY SECTION SEVEN HUNDRED FORTY OF THIS CHAPTER.

S 766. REMEDIES. 1. WHERE A DEFENDANT HAS BEEN FOUND TO HAVE ENGAGED IN ABUSIVE CONDUCT, OR CAUSED OR MAINTAINED AN ABUSIVE WORK ENVIRONMENT, THE COURT MAY ENJOIN SUCH DEFENDANT FROM ENGAGING IN SUCH ILLEGAL ACTIVITY AND MAY ORDER ANY OTHER RELIEF THAT IS APPROPRIATE INCLUDING, BUT NOT LIMITED TO, REINSTATEMENT, REMOVAL OF THE OFFENDING PARTY FROM THE PLAINTIFFS WORK ENVIRONMENT, REIMBURSEMENT FOR LOST WAGES, MEDICAL EXPENSES, COMPENSATION FOR EMOTIONAL DISTRESS, PUNITIVE DAMAGES AND ATTORNEY FEES.

2. WHERE AN EMPLOYER HAS BEEN FOUND TO HAVE CAUSED OR MAINTAINED AN ABUSIVE WORK ENVIRONMENT THAT DID NOT RESULT IN A NEGATIVE EMPLOYMENT DECISION, SUCH EMPLOYERS LIABILITY FOR DAMAGES FOR EMOTIONAL DISTRESS SHALL NOT EXCEED TWENTY-FIVE THOUSAND DOLLARS AND SHALL HAVE NO LIABILITY FOR PUNITIVE

DAMAGES. THE PROVISIONS OF THIS SUBDIVISION SHALL NOT APPLY TO ANY EMPLOYEE WHO ENGAGES IN ABUSIVE CONDUCT.

S 767. ENFORCEMENT. 1. THE PROVISIONS OF THIS ARTICLE ARE ENFORCEABLE BY MEANS OF A CIVIL CAUSE OF ACTION COMMENCED BY AN INJURED EMPLOYEE.

2. NOTWITHSTANDING THE PROVISIONS OF THE CIVIL PRACTICE LAW AND RULES, AN ACTION TO ENFORCE THE PROVISIONS OF THIS ARTICLE SHALL BE COMMENCED WITHIN ONE YEAR OF THE LAST ABUSIVE CONDUCT WHICH IS THE BASIS OF THE ALLEGATION OF ABUSIVE WORK ENVIRONMENT.

S 768. EFFECT OF OTHER LAWS. 1. NO PROVISION OF THIS ARTICLE SHALL BE DEEMED TO EXEMPT ANY PERSON OR ENTITY FROM ANY LIABILITY, DUTY OR PENALTY PROVIDED BY ANY OTHER STATE LAW, RULE OR REGULATION.

2. THE REMEDIES OF THIS ARTICLE SHALL BE GRANTED IN ADDITION TO ANY COMPENSATION AVAILABLE PURSUANT TO THE WORKERS' COMPENSATION LAW; PROVIDED, HOWEVER, THAT NO PERSON WHO HAS COLLECTED WORKERS' COMPENSATION BENEFITS FOR CONDITIONS ARISING OUT OF AN ABUSIVE WORK ENVIRONMENT, SHALL BE AUTHORIZED TO COMMENCE A CAUSE OF

ACTION PURSUANT TO THIS ARTICLE FOR THE SAME SUCH CONDITIONS.

S 2. This act shall take effect immediately, and shall apply to abusive conduct occurring on or after such date.

APPENDIX K

[According to JP Morgan Chase Bank, this "Climate Study" was conducted by Ms. Shannon Terry.]

The below comments are taken from conversations with the current employee population reporting to Raymond Kong. Interviews were held with these employees from 7/22/02-7/25/02.

Areas of Concern

- Screams at employees
  - Team meetings
  - At cubicles – whole floor can hear
- Verbally abusive
  - Vulgarity/Cursing
  - Openly embarrasses employees
    - Conveys personal feedback in team settings
- Inappropriate comments
  - "find another job"
  - "you are incompetent"
  - "you saw what happened to Christian, you are next."
- Discriminatory Comments
  - Race/Sexual Orientation
  - "People like you are not meant to be leaders."

    - References Christian Williams
- Too emotional
    - Possessive with work – will not teach employees what he is working on
    - Employees feel that they can not express their opinion without him getting emotional, they feel it is a waste of time to speak their mind.
    - Lack of patience
    - "he is not trained to be a manager."
- Turnover
    - Two employees are actively looking for new roles based on Raymond alone . . . they enjoy their job and the team, but can not continue to work for Raymond.
- Performance Reviews
    - Employees do not feel they receive accurate/fair performance reviews
    - Do not take into account his "back and forth" direction

Strengths

- Very strong technically
- Knows the business
- Can be a good teacher if the setting is right

APPENDIX L

[LOGO] JPMorganChase

WRITTEN WARNING STATEMENT

Employee's Name: Raymond Kong	Payroll Number: xxxxxx
Group/Division/Cost Center Name: Rates/Global Books/FX IRMG and Currency (35360)	
TYPE OF WARNING ■ First Written Warning ☐ Final Written Warning Two-month Restriction Period: Beginning Date: _____August 12, 2002 _____ Ending Date: _____October 10, 2002_____	
Has a first written warning been administered within the past 14 months? ☐ Yes Date: _____ ■ No If yes, attach a copy.	
Is the employee scheduled to receive a salary increase during the two-month restriction period? ☐ Yes Date: _____ ■ No	
REASON(S) FOR THIS WARNING – Describe specific examples of the problem(s) and the date(s) the problem(s) occurred.	

In January 2002, we had a year-end performance discussion in which we addressed some unprofessional behavior, specifically relating to an employee's concern around a comment you had made, "People like you are not meant to be leaders." During this conversation, you acknowledged the fact that you needed to focus on improving your management skills. Since that conversation, the following has occurred:

A climate study was conducted within your group during July 2002. The results of this climate study have confirmed many behaviors that are unacceptable at a VP management level. Some examples of this inappropriate behavior are as follows:

- Screaming, verbally abusing, cursing and embarrassing employees in public forums.
- Constant inappropriate comments such as "you are incompetent", "find another job."
- Referencing past issues with employees who have left the team. (Christian Williams)
- Employees have indicated that they are actively seeking other roles because they are unhappy with the work environment that you foster.
- You do not solicit input or opinions and are not receptive to new ideas from your staff.
- Lack of patience and respect for others – employees do not feel as though they can express their opinions without you getting emotional and raising your voice.

All employees on your team have validated all of the above information, if they had not experienced one of these behaviors directly, they did confirm that they have witnessed them happen to others. Based on the findings of this climate study, it is apparent that your current behavior is not representative of an effective manager or of the firm's values.

MANAGEMENT EXPECTATIONS –

Indicate performance expectations, plan of action and time frames for improvement.

Significant and immediate improvement in your management behavior is necessary in order to avoid a final written warning. As part of this warning process you will be required to attend the following training courses:

- Microinequities
- Fundamental Management Skills

In addition to these courses, you are required to conduct yourself in compliance with the values of the firm in your day to day interaction with your team. A subsequent climate study will be completed before year-end to ensure that expectations are being met.

Manager's Name:

Gary Ford

Manager's Signature:	Date: August 12, 2002

HUMAN RESOURCES APPROVAL (needed before warning is administered)	
Human Resources Representative's Name: Shannon Terry	
Human Resources Representative's Signature:	Date: August 12, 2002

EMPLOYEE'S ACKNOWLEDGEMENT – I have read the contents of this warning. While I am not necessarily expressing my agreement with the reasons for this warning, I fully understand that:

1. If I do not demonstrate and maintain a satisfactory level of improvement or if any other problem develops (e.g., performance, attendance, lateness, etc.), at any time during the next 14 months, corrective action may proceed to the next step in the process. If this is a **final written warning**, I understand that the next step in the process is a recommendation for dismissal.
2. A copy of this written warning has been given to me.
3. I may attach a separate statement to this Form.
4. I understand that I am not eligible for a salary increase, promotion, transfer, job

posting or to apply for the tuition program during the two-month restriction period.

5. If I begin a leave of absence during the two-month restriction period, this written warning will resume when I return to work.

_____ _____

Employee's Signature Date

Copy to:Employee

Human Resources Representative
Personnel File (Original)

APPENDIX M

[Filed as a Docketed Exhibit with the Amended Complaint.]

AFFIDAVIT OF ROBERT FISCH

Robert Fisch, being duly sworn, deposes and states the following is true and correct:

1. **I am a citizen of the United States of America, and I reside at xxx x xx xxxxxx, xxx xxxx, xx xxxxx.**

2. **I worked at Chase Manhattan Bank from 1991 to 1998, and I was an Assistant Vice President of the bank in Trading Systems area on the FACTs team under Raymond Kong.**

3. **All the statements in this affidavit refer to my personal knowledge and observations during the time I was employed at Chase Manhattan Bank.**

4 **Christian Williams was my co-worker at Chase Manhattan Bank. Christian was on the LOPS team. Both the FACTs and LOPS teams where** [sic] **under the supervision of Raymond Kong.**

5. **I, Robert Fisch am a gay man.**

6. **I, Robert Fisch informed Mr. Raymond Kong of my HIV status in 1996 or 1997.**

7. **Mr. Raymond Kong knew that I was gay because at the time that I told him**

about my HIV status he asked me if I had a significant other in my life.

8. **Mr. Kong was regularly demeaning, belligerent, and hostile toward myself.**

9. **While on the FACTs team Mr. Kong regularly had me work on the less desirable aspects of the project work, while others were retrained in Java and had more desirable work.**

10. **Ed Szamotula was a co-worker of mine on the FACTs team also under Raymond Kong.**

11. **Even though Mr. Ed Szamotula is heterosexual, I Robert Fisch thought that Mr. Ed Szamotula was gay when I first met him because Mr. Szamotula is somewhat effeminate.**

12. **I sponsored Mr. Williams in both the 1997 and 1998 Aides Walk New York events which raise money for GMHC (Gay Men's Health Crisis).**

13. **In 1998 I sought and found employment elsewhere because it was evident to me that I had no future at Chase Manhattan under Raymond Kong.**

14. **I resigned primarily because of Mr. Raymond Kong.**

15. **Mr. Raymond Kong's behavior toward me was such that I grew to hate him.**

16. **I have no doubt that Mr. Raymond Kong hated me, possibly because I was gay or because of my HIV status.**

17. **I do not know the reasons for Raymond Kong's behavior toward me, Mr. Ed Samotula** [sic], **Mr. Christian Williams or anyone else. It is possible that he discriminated against me because I am gay.**

18. **Since leaving Chase Manhattan Bank I have worked at the Bank of New York.**

19. **My last salary under Mr. Raymond Kong was roughly 65K. My starting salary at Bank of New York was 85K. My current salary at Bank of New York is 105K.**

NYDL
xxx xxx xxx EAP

/s/ Robert S. Fisch 2/14/03
Robert Fisch

2/14/02
Date

/s/ Sandra Carlson
SANDRA CARLSON
Notary Public, State of New York
No. 24-4788617
Qualified in Kings County
Cert. filed in New York County
Commission Expires 5/31/03

APPENDIX N

Family Medical Practice
255 Eastern Parkway
Brooklyn, NY 11238
Tel. (718)636-8291

Tuesday, August 13, 2002

To Whom It May Concern:

Re: Christian Williams DOB: xxxxx xx, xxxx

1) My name is Henry Beaulieu. I am a Psychiatrist with license #xxx xxx

2) I work at 255 Eastern Parkway, Brooklyn, NY 11238. The phone number is (718)636-8291.

3) Christian Williams is a patient of mine.

4) Christian Williams is suffering from Acute PTSD (Post Traumatic Stress Disorder) as a result of being psychologically abused at work and cruelly packaged out by his boss Mr. Raymond Kong.

5) As a result of the abuse Mr. Williams sustained: poor sleep, panic attacks, feelings of hopelessness and helplessness, migraines, anxiety, and depression.

6) He was put on Paxil/40 mg Q 9:00 pm and clonazepam to assist him with his depression and his anxiety.

7) Christian Williams' short-term prognosis is good if he is compliant with medication and therapy.

8) His long-term prognosis is good if he continues to remain in treatment.

9) His patient treatment plan is

   a. Pharmacotherapy

   b. Cognitive Behavior Therapy

   c. Biofeedback Therapy x 10 sessions.

10) Patient does not appear to suffer from any other form of disorder.

Sincerely

/s/ Henry Beaulieu
Henry Beaulieu, M.D.

HENRY BEAULIEU, M.D.
LIC # xxx-xxx

APPENDIX O

[Filed as a Docketed Exhibit with the Amended Complaint.]

AFFIDAVIT OF PSYCHIATRIST
HENRY BEAULIEU
October 8, 2002

Dr. Henry Beaulieu, being duly sworn, deposes and states the following is true and correct:

1. **My Name is Dr. Henry Beaulieu. I am a Psychiatrist with license #xxx xxx.**

2. **On Tuesdays I work at the Family Medical Practice at 255 Eastern Parkway, Brooklyn, NY 11238. The phone number there is 718-636-8291. The Fax number there is 718-398-3168.**

3. **Christian Williams is a patient of mine whom I see on Tuesdays at the Family Medical Practice.**

4. **Mr. Williams is suffering from Acute PTSD (Post Traumatic Stress Disorder) and PDSD (Prolonged Duress Stress Disorder) as a result of being psychologically abused at work and cruelly packaged out by his boss Mr. Raymond Kong.**

5. **Based on my diagnosis and counseling sessions with Mr. Williams, it is evident that Mr. Williams questions the real sexual orientation of Mr. Kong based upon Mr. Kong's pattern of psychological abuse of him, and other gay or effeminate men.**

6. **I have prescribed Paxil / 40 mg Q 9:00 pm, Clonazepam / 1 mg Q 8:00 pm, and Geodon / 40 mg Q 8:00 pm to assist Mr. Williams with his depression and anxiety.**

7. **Mr. Williams is also receiving weekly Psychotherapy.**

8. **I have ordered Mr. Williams to refrain from all stressful activities including work for the next five months. After five months I will re-evaluate his ability to go back to work.**

9. **Mr. Williams had asked me to contact his attorney Denise K. Bonnaig to explain to her his diagnosis, prognosis, and treatment plan.**

10. **I phoned Ms. Bonnaig.**

11. **I told Ms. Bonnaig that Mr. Williams has Acute PTSD and some form of mild bipolar disorder. I also told Ms. Bonnaig that I did not want Mr. Williams to be working for at least five months after which I would reassess his ability to return to work.**

12. **Mr. Williams' short-term prognosis is good if he is compliant with medication and therapy.**

13. **Mr. Williams's long-term prognosis is good if he continues to remain in treatment. However, as I do not see him as being able to work for at least five months if not longer, I am concerned that he may leave treatment**

because of inability to pay, or lack of insurance.

14. **Mr. Williams current treatment plan is**

    14.1. Pharmacotherapy

    14.2. Cognitive Behavior Therapy

    14.3. Biofeedback Therapy x 10 sessions

15. **Mr. Williams does not appear to suffer from any other form of disorder.**

16. **Following his last meeting with Ms. Bonnaig, Mr. Williams came to see me. An exacerbation of his anxiety and further decrease of his frustration tolerance were noted. Mr. Williams no longer wants Ms. Bonnaig to represent him. We (Therapist and MD) have been giving support to Mr. Williams as he is going through this turmoil at this point in his life.**

Sincerely,

HENRY BEAULIEU, M.D. Henry Beaulieu
LIC # xxx-xxx
Henry Beaulieu M.D.

APPENDIX P

[Filed with the Plaintiff's Objections to MHD's Report and Recommendation.]

Affirmation In Re: Christian Erik Williams DOB xx/xx/xxxx

I Dr. Marthe Abraham do affirm that the following are true and correct to the best of my knowledge. My cellular number is xxx-xxx-xxxx or I may be contacted via the Family Medical Practice, 255 Eastern Parkway, Brooklyn, New York 718-636-8291.

Psychiatric Evaluations: Mr. Williams is a 42 year old white male who has been treated at our clinic since July of 2002. Mr. Williams psychiatric treatment began with the late Dr. Beaulieu whom diagnosed him with acute PTSD as per chart documentations the onset of PTSD is a result of psychological trauma that his former boss R. Kong inflicted on him at JPMorgan Chase Bank. As with any abuse victim, Mr. Williams presented with symptoms of panic attacks, insomnia, hopelessness, helplessness, somatic complaints mainly frequent migraines, stomach cramps etc. Patient remained compliant with treatment of psychotherapy, medication management until the passing of Dr. Beaulieu.

In September 2003, I took over the case. When I first examined him he was calm but still preoccupied with theme of work place abuse. He was concerned about his future in the work market like any other traumatized victim. He was somewhat avoidant and

gave few details about his traumatic experience. He was continued on all his medications namely Paxil and Konopin.

On subsequent visits it was clear that patient continues to suffer with PTSD. He often expressed frustration, anger about being victimized several times over. His psychological low point came when the court unnecessarily delayed their ruling on his case, and an [sic] newspaper article appeared criticizing the judge in his case. At that time Mr. Williams had relapsed into acute PTSD symptomatology. He reported frequent flashbacks of his former boss yelling at him, packaging him out. He feels victimized all over again. He started having severe difficulties sleeping. He became very disorganized his attention span diminished so that he couldn't complete any given task. He was unable to keep his house clean or organized, everything became a burden. He was feeling overwhelmed. He also presented with increased anxiety, palpitations, disorganized behavior.

Patient has not been able to stabilize enough to return to work setting. He has remained compliant with prescribed treatments. He has experienced some adverse reactions to some medications which were promptly discontinued. We are still in the process of trying new treatments in order to achieve a stable response. His current medications are: Wellbutrin SR 2150 mg PO Bid, Zoloft 50 mg Po Od, Clonazepam 1 mg Po Bid Prn. His prognosis is guarded due to chronicity of symptoms, inability to put closure on the psychological trauma. I am concerned that Mr.

Williams [sic] become permanently disabled with chronic PTSD. As long as the case remains in limbo in the judiciary system Mr. Williams psychological wellbeing will continue to be unstable.

Conclusions: It is my professional opinion based on a fair degree of medical certainty that Mr. Williams's psychiatric impairment stemmed from emotional trauma caused by psychological abuse suffered at his work place.

/s/ Marthe Abraham
Marthe Abraham M.D.

SWORN TO BEFORE ME ON
THIS 7th DAY OF November 2005

/s/ Bonita J. Hardwick
NOTARY PUBLIC

MARTHE ABRAHAM M.D.
NBHN #xxxxxx
Lic # xxxxxx
DEA # xxxxxxxxx

BONITA J. HARDWICK
NOTARY PUBLIC,
State of New York
No. 02HA6001951
Qualified in Kings County
Commission Expires
January 26, 2006

APPENDIX Q

Family Practice
Martha* [sic] *Abraham, M.D.
255 Eastern Parkway
Brooklyn, NY 11238
Tel: 718-636-8291

August 3, 2006

Affirmation Statement
Re: Christian Williams
[Address omitted
in printing.]
DOB xx/xx/xxxx

I am doctor Marthe Abraham and I am specialized in general psychiatry. I am NY State licensed since 1997.

Since September 2003, I have taken over the case of Mr. Williams at the family practice office located at 255 Eastern Parkway in New York. The distinguishable Dr. Beaulieu whom passed away unexpectedly in May 2003 previously treated Mr. Williams. Patient has been diagnosed with Post Traumatic Stress Disorders, which he developed after being exposed to enduring psychological trauma from his boss R. Kong at J.P Morgan Bank. At the time of his evaluation Dr. Beaulieu documented the following: Panic, insomnia, hopelessly helplessness, somatic complaints, flashbacks. In September 2003 when I took over the case Mr. Williams was still psychologically traumatized. He was very preoccupied with theme of abuse that occurred at work place: Like any victim of PTSD,

he avoided talking about details of the psychological abuse. As you all may know, PTSD victim [sic] hate to relive their abuse they always try to avoid it.

He was always been a very compliant Patient He follows his treatment well. He always come [sic] for his appointments. Mr. Williams is not psychotic, he is not delusional. He possesses good sense, good judgment, and good insight into his illness. Mr. Williams retains full cognitive function. His intellect is intact. His emotions are perturbed by the past psychological trauma sustained at his work place. He continues to have difficulty to focus, to concentrate. He continues to have bouts of depression, anxiety inability to complete tasks i.e to maintain an organized environment at home etc. Because of this lasting symptomatology he has not been able to be gainfully employed.

Patient still requires pharmacotherapy and counseling. He is currently taking the following medications:

Wellbutrin SR 150mg twice a day
Zoloft 100 mg by mouth daily
Clonazepam 1 mg twice a day as needed.

Currently Mr. Williams is trying to get his case heard at the judiciary level. He is encouraged to pursue the legal system for his cause. A resolution might bring closure to his psychological torture. For the court record, Mr. Williams is mentally fit to present his case. He is of sound judgment in hypothetical situation. Mr. Williams is deemed psychiatrically fit to present his case to the court system.

As a psychiatrist I am asking that the court allow my patient to present oral arguments of his appeal.

Sincerely,

/s/ Martha [sic] Abraham
Martha [sic] Abraham M.D
Psychiatrist

/s/ Victor Leon 8/3/06
Notary

VICTOR LEON
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 4982686
QUALIFIED IN NASSAU COUNTY
MY COMMISSION EXPIRES 7/30/07

APPENDIX R

October 17, 2005

To Whom It May Concern:

I Michael James Hall M.D. do affirm under the penalty of perjury that the following are true and correct to the best of my knowledge.

I live at xxxxx xxxxx, xxxxx, xxxxx, xxxxx xxxxx

My telephone number is xxx.xxx.xxxx My email is: xxxxxxxxxx

I was the Plaintiff in case Hall v. The New York Presbyterian Hospital, et al U.S.S.D.N.Y. 00-Civ-7858 presided over by Hon. George B. Daniels of the U.S.S.D.N.Y.

I have twice tried to file a misconduct complaint against Hon. Judge Daniels using the "Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers" under 28 U.S.C § 351 et. seq. Twice the Clerk's Office of the U.S.C.A. has rejected my misconduct complaint without action on the basis of technicalities. Moreover, I have directly petitioned the Honorable Chief District Judge Mukasey regarding this matter without success.

It is my opinion and belief that the complaints process Under 28 U.S.C. § 351 et. seq. is [sic] corrupt in the 2nd Circuit Appeals Court and that the "Clerk's office" of the U.S.C.A, and possibly Chief Justice Mukasey are both inappropriately providing safe harbor and illegally shielding Hon. Judge George B.

Daniels from complaints of misconduct therby [sic] subverting the judicial process of the United States of America.

I regard the questionable stated reasons for the rejection of my complaints against Judge George Daniels to be "frivolous". Likewise, because the complaint process is flawed, I have made my complaint public posting it on the Internet where Mr. Christian Williams found it and contacted me due to his grave concerns.

I would gladly pursue a class action suit against the U.S.C.A., U.S.S.D.N.Y. and Chief Justice Mukasey for illegally shielding Hon. Judge George B. Daniels from complaints of misconduct. It is obvious, from the actions outlined, improper activity has occurred and Judge Daniels has intentionally disregarded vital evidence and by inappropriately granting summary judgment dismissing my case.

Sincerely,

/s/ Michael James Hall
Michael James Hall, MD, MSc

[SEAL] Virginia Abreu
Commission # DD358278
Expires: NOV. 08, 2008
Bonded Thru
Atlantic Bonding Co., Inc.
/s/ Virginia Abreu 10/28/05

APPENDIX S

July 28, 2006

RE: Michael J Hall MD v. The New York Presbyterian Hospital et. al. U.S.S.D.N.Y. 00 Civ-7858

To Whom It May Concern:

I Michael J. Hall M.D., M.Sc. do affirm under the penalty of perjury that the following are true and correct to the best of my knowledge.

* I am a United States citizen and currently reside in the State of Florida

* I am a fully credentialed and board certified family physician currently practicing in the state of Florida.

* I am an honorably discharded [sic] veteran of the United States Air Force.

* My contact information is: phone: xxx.xxx.xxxx
  Email contact: xxxxxxxxxx

* Signed and notarized by a notary public (see below)

I was the Plaintiff in a federal civil case Hall v. The New York Presbyterian Hospital, et. Al. U.S.S.D.N.Y. 00 Civ-7858. Honorable Judge George B. Daniels was the presiding district judge in Southern District of New York.

I have made several unsuccessful attempts to file a judicial misconduct complaint against the Honorable Judge George B. Daniels using the "Rules of the Judicial Council of the Second Circuit Governing

Complaints Against Judicial Officers" under federal law 28 U.S.C § 351 ET. Seq. My attempts were thwarted by the Clerk's office of the U.S.C.A. and were rejected on the basis of filing technicalities.

Moreover, I have directly petitioned the Honorable Judge Michael B. Mukasey regarding this matter after Judge George B. Daniels was exposed in the *New York Times* (December 6, 2004) as being corrupt and maladroit. The Honorable Judge Michael B. Mukasey has been ineffectual in maintaining a fair court.

It is my opinion and strong belief that the complaint process Under 28 U.S.C. §351 et. seq. is faulty and the Second Circuit Appeals Court and the Clerk's office of the U.S.C.A have intentionally denied multiple requests for investigation of a judge who clearly needs to be invesitgated [sic] and possibly impeached.

Ultimately, the Second Circuit Appeals Court is corrupt by providing inappropriate safe harbor for a debauched federal judge, thereby illegally shielding Judge George B. Daniels from complaints of misconduct, denying due process and subverting the judicial process of the United States of America.

I regard the decisions for the rejection of my complaints against Judge George B. Daniels to be highly suspect and disappointing. Likewise, because the complaint process is incestuous, has no actual oversight and subverted, I have contacted several members of the judiciary oversight committess [sic]

including Representative Sensenbrenner and Senator Schurnmer regarding this issue.

Moreover, I would take part in a class action lawsuit against the U.S.C.A. for shielding Judge George B. Daniels from complaints of misconduct and the U.S.S.D.N.Y. for ignoring vital evidence and inappropriately granting summary judgment dismissing my case despite that vital evidence which should have, if used appropriately considered, allowed my case to proceed to discovery.

Also, I would be willing to testify in any court regarding Judge George B. Daniels illicit actions during a Judicial Council hearing or in support of Christian William's pleadings.

Sincerely,

/s/ Michael James Hall
Michael James Hall, MD, MSc

cc: Honorable Judge Michael B. Mukasey
Honorable Judge George B. Daniels

/s/ Carmen G. Rodriguez
[SEAL] CARMEN G. RODRIGUEZ
MY COMMISSION
DD 2964[illegible]
EXPIRES: March 4, 2008
Bonded Thru Budget
Notary Services

APPENDIX T

AFFIDAVIT OF ANGELA TORRES-ESTEVES August 8, 2002

1. My name is Angela Torres-Esteves and I am a retired Registered Nurse with license number xxxx.

2. I reside at xxx xxx xxxx xxx, xxx xx, xxxxxxx, xx xxxxx.

3. My home phone number is xxx-xxx-xxxx.

4. I have known Christian Williams since he was introduced to me in 1996.

5. I was first notified by Christian Williams of Raymond Kong's disrespectful and unfair treatment of him in or about 1999.

6. Christian Williams has complained to me about Raymond Kong's behavior on a regular basis since 1999.

7. In my opinion Christian Williams is suffering from PTSD (Post Traumatic Stress Disorder) caused by the extreme pattern of malicious abuse perpetrated upon him by Raymond Kong over the past several years which culminated in Raymond Kong packaging out Christian Williams.

8. In my opinion Christian Williams exhibits all the major symptoms of Post Traumatic Stress Syndrome as a result of Raymond Kong's pattern of malicious abuse against him.

9. Christian Williams has complained to me about sleep problems, flashbacks, intrusive and troubling images, impaired memory, forgetfulness, an

inability to concentrate, and joint and muscle pains with no obvious cause.

10. I have observed Christian Williams' hypervigilance, exaggerated startle response irritability, sudden intense anger and occasional violent outbursts, panic attacks, hypersensitivity, obsessiveness, depression, survivor guilt for surviving Raymond Kong's abusive treatment when others are still suffering, undue fear, low self-esteem, low-self confidence, low self-worth, physical numbness, emotional numbness, detachment behaviors, avoidance behaviors, and physical and mental paralysis at any reminder of his experience with Raymond Kong.

11. Christian Williams has had numerous panic attacks that have been so severe; those attacks have caused him to appear at my apartment at all hours of the night and early morning. Each time I have had to stay up for hours listening to him talk about the same thing over and over. Each time I have had to listen to his fears and his anguish about what Raymond Kong has done to him and his doubts about how he will ever manage to put his life back together. At other times Christian has had panic attacks that have caused him to call me at least 20 times a day filling up my caller id.

12. Christian Williams has found it difficult to do mental tasks because he has a severe lack of concentration. Christian Williams has been unemployed for nearly a year and is under constant reminder of what Raymond Kong has done to him.

13. Christian Williams has told me that he feels that Raymond Kong blackballed him out of JPMorgan Chase. Christian Williams has also told me that Raymond Kong was constantly lying about his contributions to the LOPS team, the team's projects, his abilities, and his accomplishments. This problem was compounded by the fact that Raymond Kong's superiors were for the most part non-technical managers who did not have the skill set to double check what Raymond Kong was telling them.

14. It is also my opinion that Christian Williams may also suffer from PDSD (Prolonged Duress Stress Disorder, also referred to as Complex PTSD or Acute PTSD). Christian has explained to me over several years how Raymond Kong has abused and bullied him in the workplace. I believe the prolonged exposure to Raymond Kong's manipulative abuse may have caused this more extreme version of PTSD in Christian Williams.

15. I first tried to have Christian Williams see a Psychiatrist about a month before he was packaged out of JPMorgan Chase.

16. I have insisted that Christian Williams see a Psychiatrist specifically to get treatment for his Post Traumatic Stress Disorder.

17. Christian Williams has begun seeing Psychiatrist Henry Beaulieu.

18. Untreated, the symptoms of PTSD can last a lifetime, impairing health, damaging relationships and preventing people from achieving their potential. Even with treatment, Raymond Kong's

victimization of Christian Williams may have given Christian Williams a life long negative disorder.

19. In my observations of Christian Williams' change of behavior since 1999, I believe that other workers may be being treated like Christian Williams, and they may show similar symptoms of PTSD and PDSD. I believe JPMorgan Chase should conduct psychiatric assessments of all of Raymond Kong's current and former subordinates, both employees and consultants, specifically to check for PTSD an PDSD.

Sincerely,

/s/ Angela M. Torres Esteves B.S.R.N.
Angela Torres-Esteves B.S.R.N.

8/08/02

/s/ Gladys B. Tertulien
GLADYS B. TERTULIEN
Notary Public, State of New York
No. 01TE4901755, Qual. in Queens Co
/s/ Gladys B. Tertulien

APPENDIX U

STRATEGIES FOR LONGEVITY, P.C.
Interventional Hormone Replacement Therapy

DR. JERROLD GOLDSTEIN, P.C.
President/Internist

NEW JERSEY OFFICE:

55 Essex Street,
3rd Floor
Millburn, NJ 07041
Tel.: (973) 921-9500
Fax: (973) 921-2888

FLORIDA OFFICE:

2500 N. Military Tr.,
Suite 130
Boca Raton, FL 33431
Te;.[sic]: 561-241-4707
Fax: 561-241-4737

DR. ROBERT TAYLOR

Physicians Assistants
Charles Chandler R.P.A.C.
Kristen O'Dell R.P.A.C.

Physician Assistant
Armando Cardon R.P.A.C.

RE: Christian Williams

To Whom It May Concern:

This letter is to inform you that Christian Williams is a patient of Dr. Goldstein and has been seen at this office on a weekly basis for depression. Mr. Williams has been a patient since January 2, 1997 initially for fatigue, edema, hypogonodism, and weight management. Starting in 1999 Mr. Williams was treated for depression initially with Zoloft, then Prozac. Mr. Williams's psychiatrist is now treating his depression.

Thank you,

/s/ K Manzo
Krysia Manzo

APPENDIX V

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NEW YORK 10007-1312

CHAMBERS OF
MICHAEL B. MUKASEY
CHIEF JUDGE

PHONE
(212) 805-0234

February 10, 2005

Dr. Michael Hall
328 Winnebago Dr.
Lake Winnebago, MO 64034

Hall v. *The New York Presbyterian Hospital, et al.*, 00 Civ. 7858

Dear Dr. Hall:

With reference to your letter of December 24, 2004 in connection with the above case, please be advised that although I hold the administrative title of Chief Judge, I have no authority to review cases on the docket of any other judge of this Court.

Very truly yours,

/s/ Michael B. Mukasey

cc: Judge Daniels

APPENDIX W

January 5, 2006

TO: Hon. George B. Daniels Hon.
United States Courthouse
40 Center Street, Room 410
New York, NY 10007-1581

Stacey L. Blecher, Esq.
Frederic L. Lieberman, Esq.
LEGAL DEPARTMENT
One Chase Manhattan Plaza, 26th Fl.
New York, New York 10081

CC: Hon. Michael H. Dolinger
United States Courthouse
500 Pearl Street, Room 1670
New York, New York 10007-1312

RE: Christian Williams V. J.P. Morgan Chase Bank USSDNY 02 CIV 4250 (GBD)(MHD) And Cross-Motion to Remove Ms. Bonnaig for Cause Entered October 11, 2002

Dear Hon. George B. Daniels: -

Before filing my notice of appeal I contacted the Pro Se Office to ensure that the original Cross-Motion to Remove Ms. Bonnaig for cause and all its associated exhibits were appropriately docketed as part of case 02 Civ 4250. If your honor recalls, I was prohibited by the Pro Se Office to file that cross-motion with the Pro Se Office as I technically had representation from Ms. Bonnaig. I was forced to file that cross-file motion directly with Your Honor on October 11, 2002. Your Honor ruled that same day:

"Plaintiff's counsel having moved to withdraw as counsel **and plaintiff having cross-moved to have his counsel removed**, IT IS HEREBY ORDERED that counsel is relieved and plaintiff is granted permission to proceed *pro se* in the instant litigation."

Your Honor's copy of that cross-motion and its exhibits are the originals that need to be docketed with the Pro Se office. The Pro Se Office has informed me that Your Honor's Chambers have never docketed the originals with the Pro Se Office and they have no copies of my cross-motion and its exhibits. I asked the Pro Se Office if I could file copies as Your Honor did render the attached ruling, but they said I would need Your Honor's permission to enter the copies. Therefore I am formally asking Your Honor to have Your Honor's staff find the original cross-motion and its exhibits and properly docket them with the Pro Se Office. If Your Honor's office is unable to find the original cross-motion and its exhibits, I ask that Your Honor give explanation as to what most likely happened to the originals, why they cannot be found, and to grant me permission to file appropriate copies of my cross-motion and its exhibits with the Pro Se Office and defense counsel. At this time I see no reason to keep my attorney/client privilege with regard to any of the cross-motion documents.

Dated: January 5, 2006
New York, New York

Sincerely,

/s/ Christian E. Williams

Christian E. Williams,
PRO SE
268 Barrow Street, GRDN
Jersey City, New Jersey
07302-4026
Voice: 201-324-0869
Fax: 775-242-4940
Email:

TAREK MORSY
Notary Public
State of New Jersey
My Commission Expires
Jun 29, 2010

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(2)

Supreme Court, U.S.
FILED

No. _____ 08-49 JUN 25 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

CHRISTIAN ERIK WILLIAMS,

Plaintiff-Appellant-Petitioner, Pro Se,

v.

JPMORGAN CHASE BANK, RAYMOND KONG, STEVE RUTTER, PETER BIBB, GARY FORD, AND ANTHONY SHEFFERD,

Defendants-Appellees-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit, U.S.C.A. 06-1324 (cv), S.D.N.Y. 02-cv-4250

SUPPLEMENTAL APPENDIX

CHRISTIAN ERIK WILLIAMS, Pro Se
268 Barrow Street, Apt. Grdn
Jersey City, NJ 07302-4026
Tel: 201-324-0869
Fax: 775-242-4940
Email: xtianNYC@gmail.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTIAN WILLIAMS, Plaintiff, -against- J.P. MORGAN CHASE BANK, RAYMOND KONG, ANDREW HOLLY, STEVE RUTTER, PETER BIBB, GARY FORD, ANTHONY SHEFFERD, Defendants.	:	**REPORT & RECOMMENDATION** 02 Civ. 4250 (GBD) (MHD)

TO THE HONORABLE GEORGE B. DANIELS, U.S.D.J.:

Plaintiff Christian Williams has sued his former employer, JPMorgan Chase Bank ("JPMorgan" or "the bank"),[1] as well as his former supervisor, Raymond Kong, and other bank employees, asserting that he was discriminated against and eventually terminated on the basis of sexual orientation and the mistaken perception that he was HIV-positive ("HIV+") and therefore disabled, in violation of the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.* and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin.

[1] Williams sued JPMorgan Chase Bank as "J.P. Morgan Chase Bank."

Code, § 8-107. Williams also claims that the defendants subjected him to a hostile work environment and retaliated against him for complaining about Kong's treatment of him to upper-level management and the Human Resources department. In addition to his state and city human rights law claims, Williams alleges additional state common-law claims of negligent and intentional infliction of emotional distress, libel, slander, and defamation of character.

Initially represented by counsel, Williams first brought his action in May 2002 in New York State Supreme Court against the bank and Kong. In June 2002, on the basis of diversity jurisdiction, the defendants removed Williams's action to federal court. Williams, then proceeding *pro se*, filed two amended complaints.[2] Following completion of discovery, the

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[2] In January 2003, Williams filed his First Amended Verified Complaint, which named the bank and twelve individual defendants. (*See* Affidavit of Stacey L. Blecher, sworn to Apr. 6, 2004 at ¶ 5). The defendants moved to dismiss Williams's Occupational Safety & Health Act claims, and remand the action to state court, on the basis that diversity jurisdiction no longer existed. (*Id.* at 6). Williams agreed to drop four defendants in order to restore complete diversity. (*Id.* at ¶ 7). In an order entered on March 17, 2003, the district court dismissed plaintiff's OSHA claims and allowed him leave to file a second amended complaint (*id.* at ¶ 8 & Ex. C), which Williams filed on March 22, 2003. (*Id.* at ¶ 9). He named as defendants JPMorgan Chase Bank, Raymond Kong, Andrew Holly, Steve Rutter, Peter Bibb, Gary Ford, and Anthony Shefferd. Williams subsequently informed the court that he wished to remove Holley as a defendant. (*See* June 17, 2004 letter to the court from Christian E. Williams). In an R&R filed June 28, 2004, we recommended that

(Continued on following page)

defendants have moved for summary judgment, arguing that plaintiff's claims fail as a matter of law because Williams cannot establish that he was subjected to disparate treatment or retaliation based upon his sexual orientation or alleged perceived disability; that he was terminated as a result of a post-merger reorganization and reduction in force; and that he has provided no evidence that defendants' stated reasons for their adverse actions are a pretext for sexual-orientation or perceived-disability discrimination or retaliation.[3]

For the reasons that follow, we agree with defendants and recommend that their motion be granted.

BACKGROUND

Williams earned a degree in Computer Studies from Northwestern University in June 1985. (*See* Second Amended Complaint ("Compl.") at ¶ 22; CW

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the district court enter an order dismissing the complaint against Holley, a recommendation that the district court adopted in an order filed July 12, 2004.

[3] In May 2005, plaintiff filed a petition for a writ of mandamus with the United States Court of Appeals for the Second Circuit, seeking an order from the appeals court directing the district court to rule on defendants' motion for summary judgment. In an order filed May 19, 2005, the Second Circuit denied Williams's petition without prejudice to renewal if the district court failed to take action on the motion within 90 days. The mandate from the Second Circuit issued on May 20, 2005. (*See In re Christian Williams,* 05-0438-op (2d Cir. May 19, 2005)).

Ex. E[4] (Resume)). He worked for Salomon, Inc. and then, in July 1995 accepted an offer from Chase Manhattan Bank as a full-time Information Specialist in the Trading Operations & Systems Department. (*Id.* at ¶¶ 22, 23). During his employment with the bank, his responsibilities included design, development, and enhancement of financial securities trading systems. (*Id.* at ¶ 22). He worked for Chase (and its successor JPMorgan) until June 28, 2001. (Tr. #1: 15).[5] From the end of summer 1998 until his termination in June 2001, Williams reported directly to defendant Raymond Kong. (Tr. #1: 112, 113, 137, 139).

Williams describes himself as a "homosexual male who was 'out of the closet' in the workplace" and notes that his domestic partner was listed on his benefits card. (Compl. ¶ 21; CW Ex. H). He also asserts that, during his employment with the bank, he "did not hide nor deny his sexual orientation," and many of his supervisors and colleagues knew that he was gay. (Compl. ¶ 24; Tr. #1: 126; Tr. #2: 146-49). For example, in Spring 1997 and 1998, Williams

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[4] Exhibits identified as CW Ex. ___ may be found in plaintiff's Exhibits Binder (binder number two) which he submitted in opposition to defendants' summary judgment motion.

[5] Williams's deposition was taken over the course of three days, on June 17, 19, and 27, 2003. For ease of reference, citations to plaintiff's June 17, 2003 deposition testimony are referred to as Tr. #1 because the transcript for the June 19 proceeding erroneously begins again on page "1." Therefore, citations to Williams's testimony taken on June 19 and 27 are referred to as Tr. #2.

forwarded an e-mail to his colleagues at the bank seeking sponsorship for the Gay Men's Health Crisis annual AIDS Walk (Compl. ¶¶ 25, 41; CW Ex. G), he was included on the "out" e-mail list for JPMorgan Chase Pride (Compl. ¶ 24), and he introduced his then-boyfriend to several co-workers in 1996 or 1997. (Compl. ¶ 37). He was not, however, HIV+. (Tr. #1: 131).

In December 1995, Williams began working on the Leave Order Processing System ("LOPS") team. (Compl. ¶¶ 26, 28). In his 1995 job evaluation, Williams's manager rated his job performance as a "2" on a scale of 1-5, or "commendable." (Compl. ¶¶ 35, 36; CW Ex. J). Williams received a mixture of commendable and good ratings in the core job skills and responsibilities categories listed in the evaluation. (*Id.*). By the fall of 1996, the bank promoted him to Technology Officer. (Compl. ¶ 34, Tr. #1: 88-89). Williams's then-supervisor, Tom San Pietro, rated his 1996 overall job performance as a "2" in that year's job evaluation. (Compl. ¶ 35; CW Ex. L). San Pietro wrote that Williams was "a valuable member of the team," had done "a superior job of production support," and had utilized his skills in developing a new system on a very tight schedule. (*Id.*). San Pietro also noted that, with the promotion, Williams would be held to a higher performance standard. He commented that Williams had "a tendency to be unnecessarily critical of some workers," and that he had to give Williams "a little push to get a job completed

thoroughly," which he did not expect to have to do "with someone in an officer position." (*Id.*).

In August 1997, San Pietro left the bank and Williams began reporting to Shabeena Gilani, the LOPS team manager. Gilani in turn reported to Raymond Kong. (Compl. ¶ 38; Tr. #1: 15, 39, 40). Williams did not report directly to Kong until the end of summer, 1998. (Tr. #1: 113). Williams charges that Kong was the apotheosis of the "workplace bully," who fostered a hostile work environment and harassed and discriminated against him on the basis of his sexual orientation and perceived HIV+ status. He claims that this constant harassment caused him permanent psychiatric injury and culminated in his wrongful discharge. (Compl. ¶¶ 48-53, 56, 86-87, 99-106, 171-73). He further claims that the bank inadequately responded to his complaints concerning Kong and thereby aided and abetted Kong in fostering a hostile work environment (Compl. ¶¶ 55, 83-84, 90-96, 113, 121), and that the other individual defendants "never did anything to solve the problem. I was never moved and put on to another team. They didn't seem to discipline Raymond Kong in any way. I don't think they took any of my allegations seriously." (Tr. #2: 188-89). In his view, Human Resources was "impotent" and "upper management didn't care" about his grievances. (Tr. #2: 11-12). Nevertheless he asserted that none of the individual defendants, other than Kong, discriminated against him directly; in his view, they all aided and abetted Kong. (Tr. #2: 158).

During his deposition, Williams repeatedly expressed a low opinion of Kong's management style. He stated, "Kong had his own agenda: gaining power, doing the things that he wanted to do and facilitating doing the things that he wanted to do." (Tr. #1: 144). He described Kong as "generally belligerent and disrespectful. He talked down to everybody. He was a technology authoritarian. By that, I mean that it didn't matter what ideas on how to do things were floating around out there. The only idea that mattered was his idea, and that was the one that was going to occur." (Tr. #1: 99-100). Williams further offered, "[I]f you weren't totally subservient to this guy, you were shit." (Tr. #1: 42), and faulted Kong for being "dishonest," "highly manipulative," a liar and a "crappy manager." (Tr. #1: 100-02). Williams opined that Kong favored Asian employees over white employees. (Tr. #2: 145).

Williams also described Kong's negative treatment of him personally. He stated that Kong "just plain didn't like me at all." (Tr. #1: 147). Although he acknowledged that Kong, as a manager, was "generally bad to everybody," he remarked that there was a qualitative difference in how Kong treated him, which he attributed to the fact that he was gay. (Tr. #1: 124-25; Tr. #2: 145, 233), Williams testified "To me he was Satan, Lucifer, rolled into one incarnate as my manager out to get me with a smile on his face trying to look angelic to his superiors." (Tr. #2: 33). Put another way, when asked whether Kong was abusive toward other employees, Williams retorted, "Again, that is

like asking me, you know, who else was Hitler abusive to. I think he was abusive at times to everyone, but I think I had a special place in his dark heart, for lack of a better phrase." (Tr. #2: 183).

Williams points to two statements made by Kong as exhibiting his anti-gay bias. Kong made the first statement in the fall of 1997, a time when Williams was not reporting to Kong (Tr. #2: 181); according to plaintiff, Kong referred to Williams as "Christine" while working on a seating chart for the office. (Compl. ¶ 42; Tr.#2: 138-39). According to Williams, he admonished Kong for the comment, which he considered "to be both a gay slur and a sexual harassing comment implying that plaintiff was a girl." (Compl. ¶ 42). Williams stated that Kong's "pattern of malice" toward him started with this "off hand comment" and grew into his "systematic exclusion" at the workplace. (Tr. #2: 137). He charged that Kong gave him "less desirable work" and "lesser tasks" and he had to "jump through technology hoops" that were required of no one else on the team. (Tr. #2: 44, 137).

He contended that Kong discredited him and belittled his work in front of his teammates (Compl. ¶ 139(e)); made unreasonable demands upon him (Compl. ¶ 139(g)); insulted him (Compl. ¶ 139(l)); discounted his accomplishments (Compl. ¶ 139(m)); excluded him from meetings (Tr. #2: 44); and did not give him a raise. (Tr. #2: 44). For example, he complained that Kong "systematically cut[ ] me out of the LOPS rewrite . . . when I'm the one who is on the team, who knows LOPS the best, been there the

longest, I know the database code in and out, I know the C++ code in and out, I know the servers in and out. To cut me out of the redesign process is asinine." (Tr. #1: 146-47). Williams claimed that Kong treated him differently on the job due to his bias against Williams's sexual preference, not because of his job performance, and that Kong's goal was to "drive [him] off the team." (Tr. #1: 128-29; Tr. #2: 137-38). Williams arrived at this conclusion even though he had never had a conversation with Kong about his sexual orientation, had never heard Kong refer to his sexual orientation when talking with anyone else, and had never referred to Williams's domestic partner in a derogatory manner. (Tr. #1: 127-28).

The second comment that Williams regarded as revealing Kong's anti-gay bias occurred on an unspecified date when Kong rejected some of Williams's recommendations and an argument apparently ensued. (Tr. #2: 29-31). According to Williams, Kong stated, "Arguing with you is like arguing with my wife." (Compl. ¶ 110). Williams felt that Kong was insinuating that he was a girl, and characterized the comment as a "very condescending, rude thing to say." (Tr. #2: 27). During his deposition, however, Williams testified that one of his female colleagues told him that Kong had made the same comment to her (Tr. #2: 26-27), and that she felt Kong was "anti-Semitic and anti-black and anti-gay. He is anti-everything just about." (Tr. #2: 32).

When plaintiff was asked the basis of his claim that Kong had discriminated against him based upon

his perceived HIV+ status, Williams related a story involving a former bank employee, Robert Fisch, who told Kong sometime in 1996 that he was HIV+. (Compl. ¶¶ 66-67; Tr #2: 42; CW Ex. I). According to Williams, Fisch made that revelation to Kong "because he had to leave early every Thursday to go see his [AIDS] doctor." (Tr. #1: 126). Williams, who was experiencing thyroid and weight issues, also made weekly or bimonthly visits to a doctor, although he never told Kong the reason for his doctor visits. (Tr. #1: 126; Tr. #2: 39, 40, 136; Compl. ¶ 71). Williams speculates that Kong erroneously lumped him and Fisch together, as gay males, deducing that if Fisch was HIV+ and saw a doctor every week, then the reason why Williams was also seeing a doctor every week was because Williams was HIV+ as well. (Tr. #1: 126, 128). "So what Raymond saw, is, well, if closeted Bob Fisch is going every week to see his AIDS doctor, and out Christian is going every week to every other week to see his doctor, he must be HIV positive, too, and that's a conclusion that I firmly believe basically." (Tr. #1: 126).

Williams attached Fisch's affidavit – which he stated that he had written with Fisch – as an exhibit to his complaint. (Tr. #2: 42). In that affidavit, Fisch averred that Kong, his supervisor, was "regularly demeaning, belligerent and hostile" toward him, and that Kong was the reason he had sought employment elsewhere. (CW Ex. I at ¶¶ 8, 13, 14). Fisch also expressed his view that "I have no doubt that Mr. Raymond Kong hated me, possibly because I was gay

or because of my HIV status. I do not know the reasons for Raymond Kong's behavior toward me . . . Mr. Christian Williams or anyone else. It is possible that he discriminated against me because I'm gay." (*Id.* at ¶¶ 16-17). In response to a question at the deposition whether Fisch had ever complained to anyone at the bank that he was being discriminated against, Williams responded in the negative, adding, "People who discriminate just don't call you fag or you know, whatever, anymore. That's not the way they do things. Okay. They use other methods." (Tr. #1: 129)

When asked the basis of his belief that Kong had changed the terms and conditions of his employment based upon the perception that he was HIV positive, Williams responded, "He went though a pattern of malice designed to first initially push me out, [then] get me out when pushing me out did not work. Somewhere along the line, he decided for whatever reason, he didn't want me off his team, he wanted me out of the Bank." (Tr. #2: 195).

Williams never complained to anyone at the bank that Kong discriminated against him based on his perceived HIV+ status. (Tr. #1: 131-32). He explained that he did not arrive at this "after the fact" conclusion until he had left the Bank, at which time he learned that Fisch had told Kong that he was HIV+. (Tr. #1: 132). He then inferred that Kong had discriminated against him on the basis of perceived disability.

In January 1998, Gilani completed Williams's 1997 performance appraisal, and rated his overall performance a "3" or "at target" (*i.e.*, lower than his 1996 "2" rating). (CW Ex. M). While Gilani indicated that Williams "continued to do an excellent job of supporting production," she also observed that he "took too much time to complete his assignments." (*Id.*) Gilani wrote that "[t]here were many instances when it was necessary to keep Christian focused on his work and to give him a little push to complete the task"; "[h]e needs to develop a sense of urgency to get the job done"; and he "needs to improve his time-management skills." (*Id.*). She also commented that his suggestions tended to be more ideal and that he should "consider solutions that are practical" and think through "the consequences of his recommendations." (*Id.*). During his deposition, Williams disagreed with these negative assessments, and speculated that Kong had had input into the evaluation or had influenced Gilani to include them, thereby adversely affecting his rating. (Compl. ¶ 39; Tr. #1: 103-08; Tr. #1: 54-57).

Sometime in 1998, Williams met with Gayle Prescod in the bank's Human Resources department. He told Prescod that he was concerned with how Kong had treated Fisch and observed that Kong was treating him "in the same bad way if not worse." (Compl. ¶ 119). In response to Prescod's question whether Williams felt Kong was "anti-gay," Williams stated, "I don't know, but it is a concern of mine." (Compl. ¶¶ 68, 90, 119; Tr. #1: 117; Tr. #2: 92).

Approximately a year later, Williams complained to Prescod again, this time about Kong's "manipulative behavior" as well as his "unfair reviews, lack of raises and lack of bonuses." (Compl. ¶ 119). Prescod responded in the negative to Williams's inquiry whether he could be independently evaluated without Kong taking part in the review. (Compl. ¶ 119; Tr. #1: 121).

By January 1999, Kong had become Williams's direct manager. He was therefore the person who completed Williams's 1998 performance appraisal. (CW Ex. N). While Kong rated him "3" – "at target" – overall, he rated him "below target" in the area of "respect for others" and included numerous negative comments in the competency assessment section. On the one hand, Kong observed that Williams had "all the necessary technical skill and business knowledge to perform the job assigned," and was "sensitive to the need of some individual users." (*Id.*). On the other, Kong wrote that Williams's overall performance "varie[d] a lot" over the course of the year and criticized him in four areas:

(1) "Office hour punctuality." Kong indicated that Williams did not have a consistent arrival time at the office, which frustrated his teammates. Kong noted that Williams's work hours had been changed from 10:00 a.m. to 6:00 p.m. but that shift had not helped him arrive on time.

(2) "Personal life affecting work." Kong found that Williams's use of office time for personal activities

(such as buying his new home) negatively affected his job performance and the team's progress.

(3) "Unwilling to accept instruction and direction from superiors." Kong observed that Williams had "a strong feeling about what is right for the user community," and when his and the bank's directions were the same, he contributed greatly, but when bank policy and Williams's opinions diverged, "he tends to ignore [the bank's decision] and refuse[s] to act accordingly," which "limited the type of tasks that the management can give to him" and caused a "delay in his work delivery" and "inconsistency in his job performance."

(4) "Ignorance to business priority set [b]y management." Kong wrote that Williams "appears to put technology advancement above business priority," and illustrated this comment by explaining that when Williams would discuss approaches to some system issues, "he is very strong in using new technology which . . . requires a long process and [is] costly to introduce. A lot of time [w]as spent on such discussion. He will spend more time on tasks that interested him, than on tasks important to the team/ Bank." Kong concluded that Williams's approach occasionally caused work delay. (CW Ex. N).

At his deposition, Williams vehemently disagreed with these assessments and regarded Kong's comments as libelous. (Compl. ¶ 224; Tr. #2: 167-71). For example, he characterized Kong's statement that his

tardiness caused frustration to other teammates as "a boldface lie." (Tr. #2: 65). He complained that although Kong changed his work hours from 10:00 a.m. to 6:00 p.m., Kong had nevertheless refused his flextime request for daily variable hours. (Tr. #2: 66-68). Regarding Kong's comment that his personal life affected his work, Williams noted that others on the team were also buying homes and were engaged in personal activities while on the job, and that he put in his time by staying late, until his job was done for the day. (Tr. #2: 70-71). He also explained that his responsibilities toward his tenants did not interfere with his job. (Tr. #2: 71). In his view, Kong used his tenants as an "excuse" to say that his life was interfering with his work. (Tr. #2: 79-80).

Williams did not accept the "unwilling to accept instruction and direction" comment either, claiming that Kong provided neither leadership nor direction and was often in the way. (Tr. #2: 71). Concerning Kong's criticism that Williams ignored business priorities set by management, Williams "translated" the statement to what Kong really meant: "Christian ignored my priorities," given that "he felt he was the decision maker period." (Tr. #2: 72). Williams testified that he had begun to prepare a written rebuttal to this evaluation but had not completed it; he talked to Gail Prescott in Human Resources instead, spurred by the fact that 1998, under Kong, was the first year he had not received a bonus. (Tr. #2: 73).

In late July 1999, Kong opened Williams's Health, Life and Disability Coverage statement,

which listed his domestic partner, Carlos Pellot. (Compl. ¶ 115). Kong called Williams into his office, handed him the statement, and told him that he had opened it by mistake. (*Id.*). Williams never asked Kong if he had read it, although he was "sure" Kong had, and that it was "no mistake" that he had opened it. (Tr. #2: 20-21).

At his deposition, Williams was asked if he had ever used the word "discrimination" with bank officials when discussing Kong's unfair treatment of him. He first stated that he had used the word only with Gail Prescod, alerting her that Kong was possibly anti-gay, but then backtracked and stated that he did not use the word discrimination because it was "a serious charge with more serious implications." (Tr. #2 159-60). He explained that he was reticent about raising claims of discrimination with bank managers: "I didn't go into motive. . . . Discrimination is not a diplomatic way to go about trying to resolve a problem" (Tr. #2: 156), and he "did not feel that it would have been politically good" for him to make that charge while he was still on the team and trying to find another position in the bank. (Compl. ¶ 122; Tr. #2: 90-92). On the other hand, the record indicates that Williams did not hesitate to communicate his negative views about Kong both to Kong himself and to bank officials. On November 2, 1999, Williams wrote Kong an e-mail in response to a memorandum Kong had authored which apparently contained criticisms of Williams. William stated,

> I recognize that your memo, while descriptive highly distorts the truth and is a political play [sic] far more than a reasonable description of events of my performance. In fact, it smacks of blackballing, a highly unethical thing for any manager to encourage in any company. I strongly discourage you from continuing such action. I strongly feel that I have contributed to this team greatly, however I also feel that your function point mentality of performance is misguided, unfair, and just plain wrong.

(CW, Ex. X). In March or April 2001, Williams advised Shefferd that he was "putting together documentation" that he believed would prove that Kong was trying to "blackball" him. (Tr. #2: 90). He wrote an e-mail to Gary Ford on April 11, 2001 in which he stated, "Raymond and I do not get along. I will be extremely surprised if I am on our team list because of our mutual view of each other," and expressed his desire to work for an "honest straightforward manager." (CW Ex. Y).

At his deposition, Williams was questioned about an incident that had taken place sometime during 2000, when he was informed by a co-worker that he no longer had access to a password they needed to resolve a problem and that they had to ask John Shea for it. Williams retorted, "Oh, I would like to blow up John Shea." (Tr. #2: 93-95). He characterized the remark as "flip" and "off the cuff," but related that Shea became upset once he heard about the remark. (Tr. #2: 94-95). Williams was called into Kong's office

and, in the presence of Gilani, Kong told him that "they are going to try to get me fired over this." (Tr. #2: 97). Williams responded, "Go ahead. If you want to fire me, fire me. I'll sue you." (*Id.*). Williams explained that, at that point, he would have sued Kong for wrongful dismissal; he was not sure he would have sued for "gay discrimination." (Tr. #2: 98). He apologized to Shea via e-mail. (Tr. #2: 103; Defts' Ex. G (Deposition Exhibits) – Ex. L).

An undated and unsigned 1999 Performance Appraisal authored by Gilani again rated Williams at "3," "at target". (Tr. #2: 75-76; CW Ex. O). Williams again disagreed with the criticisms contained in this appraisal. Noting that his punctuality issues were addressed again, Williams blamed Kong for the comment and asserted that Kong's attitude toward his punctuality was unreasonable. (Tr. #2: 78-79). With the benefit of hindsight, he saw that some of his punctuality issues were "symptomatic from the workplace bullying" that he had been subjected to, but basically, "I came in, did my time and I did the job I was asked to do, and I did it to the best of my ability under what I considered to be an extremely hostile work environment." (Tr. #2: 78-79). As for timeliness in completing work, Williams stated that the criticism was "symptomatic of Raymond Kong constantly moving the goal posts on me. It was nearly impossible to get him to sign off on a specification." (Tr. #2: 80). As an example, he related a story from June 2001 when Kong asked him to remove the "bugs" from a server. He completed the task and left on vacation.

(Tr. #2: 80). When he returned to the office, Kong informed him that the server had a bug in it and that he did not understand Williams's code. (Tr. #2: 80-81). According to Williams, a co-worker told him that the bug was in Kong's database, that his code was understandable, and that "[Kong] is just out to get you, Christian." (Tr. #2: 81-83).

Williams asserts that he complained to numerous bank officers about Kong's treatment of him, to no avail. (Compl. ¶¶ 74, 84, 88-96, 102, 119, 121-23, 153, 167). He described individual defendants Rutter, Bibb, Ford, and Shefferd as exercising "supervisory capacity over Defendant Kong for a period when Defendant Kong was employed in a supervisory capacity over the Plaintiff." (Comp. ¶¶ 16-20). Williams testified that he made it clear to Rutter and Shefferd that Kong was "incapable of giving [him] a fair and impartial review," and asked for a review in which Kong did not take part. They declined his request. (Compl. ¶ 84; Tr. #1: 123; Tr. #2: 86-87). Williams told Rutter that Kong was treating him unfairly, but he never told him that he thought Kong was discriminating against him based on his sexual orientation. (Tr. #2: 87, 159). He recalled that the last time he complained to Rutter about Kong, Rutter responded, "Just do your job or you won't have a job." (Tr. #2: 88). Williams deduced that Kong had "slammed" him to Rutter, since someone had to have told Rutter he was not doing his job. (Tr. #2: 196). He also did not mention discrimination to other bank official. (Tr. #1: 135; Tr. #2: 156).

Williams realized that because the management hierarchy did not respond to his complaints about Kong and "nothing was going to be done," his only choice was to transfer out of the LOPS team, although he wanted to stay at the bank. (Tr. #2: 88-89). On January 26, 1999, Williams e-mailed Kong, stating that he felt that it was "in my best interests to move on to a different project . . . I have enjoyed working on the LOPS team, I simply feel that three years is long enough for any project and I have a strong desire to work on something new." (Tr. 2: 141 and Dep. Ex. P). During the summer of 2000, Williams informed Kong that he was setting up interviews to transfer to another area of the bank, and Kong encouraged him to look. (Tr. #1: 118-20). One interviewer told Williams that Kong had told him "that [Williams was] kind of hard to get along with, and [Williams's] JAVA [computer skills were not] very good." (Tr. #2: 172). Williams complained about Kong's comment to Shefferd, asking him, "How am I supposed to get off of this guy's team if I am being slammed?" (Tr. #2: 173). Williams felt that the basis for Kong's statement was that "he didn't like me because I was gay, and he thought I was HIV positive" (Tr. #2: 145), and characterized Kong's statement as slander. (Tr. #2: 172).

In September 2000, the Chase Manhattan Corporation – the parent of the Chase Manhattan Bank – announced that it had acquired J.P. Morgan & Co. (*See* Affidavit of Belinda L. Palmer, former Vice-President of J.P.Morgan Chase Employee Relations,

sworn to Apr. 6, 2004 ("Palmer Aff.") at ¶ 3). Following the merger, the employees from the two banks' Investment Bank Technology & Operations Departments "came together to form a single department," and the managers of the combined departments "examined their various teams to determine how best to structure the Department to support the newly merged business units." (*Id.* at ¶¶ 8, 9). The managers decided to "combine the Foreign Exchange ("FX") and Interest Rates ("IR") application developers teams" into a new unit, the "FX Systems Team," which would have three application developer positions. (*Id.* at ¶ 10). As a result of the merger of the two teams, "one of the previous positions would be eliminated." (*Id.*).

The managers evaluated the current FX team employees, which included Williams, Willie Li, and Hevel-Jean Baptiste, and the IR employee, Harrison Wu. (*Id.* at ¶¶ 11-13). Palmer recounted that "Li, Baptiste, and Wu were selected for the new FX Systems Team; as a result, Plaintiff's employment was to be terminated." (*Id.* at ¶ 14). Because the bank's Employee Relations Department reviewed and was required to approve all job eliminations and employment terminations, Palmer asked Mary Keller, a Human Resources Generalist, to prepare a memorandum "which outlined the consolidation of the FX and IR application developer teams, the employee selection criteria for the new FX System Team, and a demographic analysis of the four candidates." (*Id.* at ¶¶ 15, 16). Palmer then "reviewed the proposed job

elimination and termination of employment plan in order to determine, *inter alia*, whether the plan had a disparate impact on any protected group." (*Id.* at ¶ 17).

An e-mail that Keller wrote to Peter Bibb on May 24, 2001 states, "Peter, Employee Relations has asked to see the evaluations of the other 3 candidates considered for this developer role. There is some concern about displacing an incumbent when the role continues to exist. I'll keep you posted . . . Mary." (*Id.* at Ex. B). Follow-up e-mails sent among Keller and other bank officials revealed further concern that managers might be forced to "let talented people walk out the door while we keep those who are considered weaker performers." (JPMG 000044, found in Plaintiff's Binder #2). Keller noted that although Williams had "full project lifecycle experience," he also had had numerous conflicts with other teams, displayed a negative attitude, was unable to complete assignments on a timely basis, required heavy supervision, and showed an unwillingness to accept feedback and an inability to adopt to the changing organization environment. (JPMG 000045). She observed that Employee Relations did not believe that incumbents should be displaced even if other internal candidates were stronger. (*Id.*). In response, bank officials expressed their preference for the stronger performers and a rolling selection process. (JPMG 000043).

Defendants submitted a declaration by Mary Keller to clarify her initial e-mails referring to displacing "incumbents." Keller explained that Kong had

been selected to manage the new FX Systems Team and that he would be the one evaluating the four candidates for the three slots on the new team. (*See* Declaration of Mary C. Keller, executed Aug. 11, 2004, ("Keller Decl.") at ¶¶ 5-6). Based on past performance and potential future performance, Kong recommended to senior management – Bibb and Rutter – that Jean-Baptiste, Wu, and Li be selected and that Williams's position be eliminated. (*Id.* at ¶ 8). When she wrote her memorandum to Palmer concerning the elimination of Williams's job, Keller referred to it in the subject line of the memorandum as "FX AD Job Elimination: Christian Williams" because the two teams had not yet been combined and Williams was a member of the FX AD team. She also did not specify that the two teams were being combined. (*Id.* at ¶ 9). Keller continued, "As a result, when Ms. Palmer reviewed my memorandum, she had the erroneous impression that the Department proposed to eliminate the incumbent in one position and bring someone in from outside the Team to take over that position." (*Id.* at ¶ 9). This caused Palmer to express concern that the bank was "displacing an incumbent in favor of another candidate even though the incumbent's position continued to exist" when the other candidate was "evaluated as superior to the incumbent." (*Id.* at ¶ 9).

Keller stated that the bank had no policy against displacing incumbents in favor of other superior internal candidates during a workforce reorganization/ consolidation: while the bank preferred not to

displace an incumbent whose precise role was continuing, she and Palmer clarified that because the FX and IR teams were being combined, "*each* of the four candidates was an incumbent and was being considered for what would constitute *new* roles within the FX Systems Team." (*Id.* at ¶ 10) (emphasis in original). Thus, the concern about displacing incumbents expressed by Employee Relations "no longer existed and the job elimination and termination of Plaintiff's employment was approved." (*Id.*).

The defendants also provided a copy of Keller's memorandum to Palmer which indicated that the selection criteria against which the four candidates for the new FX Systems Team were evaluated concerned three areas of their expertise: (1) "full development project lifecycle experience (1 yr +)"; (2) "experience in RPG (3 yrs +) or Java (1 yr +)"; and (3) "FX and Swaps Front Office experience (2 yrs +)." (Palmer Aff., Ex. B (Memorandum of Mary Keller to Belinda Palmer dated May 17, 2001)). Keller's memorandum indicated that Williams had been at the bank since 1995, while Wu had been employed since 1998 and Li and Baptiste since 2000. (*Id.*).

The defendants also provided a copy of Kong's evaluation of the four candidates, which contained some of Palmer's handwritten notes. (Palmer Aff. ¶ 16 & Ex. B). Kong provided scores in each of the three selection criteria categories, rating Williams the lowest with a total of 30 points. His evaluation of Williams did not focus so much on Williams's experience in the three categories as it did on his view that

Williams had exhibited a "negative attitude towards the organization structure," "multiple conflicts with other external teams," and an inability to "complete assigned programming projects within reasonable time frame. Heavy supervision has been required." (*Id.*). In the Feedback Notes section, Kong wrote that Williams "doesn't fit the current and future work environment of my group, and perhaps any other groups within IB. He fails in adapting to the changing organization environment." (*Id.*). Kong observed that Williams sought to control software development, but did not have the necessary skills to do so, and that when he could not deliver an assignment, he tended to blame the "organizational structure." (*Id.*).

Kong's evaluation of the three other candidates was generally positive. In the "Feedback Notes" section of Baptiste's evaluation, Kong commented that Baptiste had demonstrated "self-motivation and strong-desire to learn." (*Id.*). Kong regarded Baptiste as a "valuable contributor to software development" who would only grow better with time. Palmer's notes indicated that Baptiste had less than the required experience in two of the three selection criteria categories. Nevertheless, Baptiste was rated the highest (70 points) of all the candidates. (*Id.*).

With regard to Wu, Kong wrote in the "Feedback Notes" that although Wu did not work in his group, he was "happy with [Wu's] trading floor exposure and work ethic." (*Id.*). While noting that Wu did not have the "exact JAVA skill that I am looking for," Kong felt that Wu's experience nevertheless positioned him to

do the kind of programming performed by Kong's team. He also felt that his group would provide Wu with "a path to grow with good chance of success." (*Id.*). Palmer's notes indicated that Wu had "no experience" in one of the selection criteria. He was rated at 60 points, the second-highest of the four candidates. (*Id.*).

Kong rated the final candidate, Willie Li, at 42 points, and opined that Li had a "good attitude and commitment to complete assigned tasks." Kong was confident that Li could learn the technology that the bank used, with which Li had no experience. Kong indicated that Li had "room for improvement" in his JAVA programming. Palmer made no notes on Li's evaluation. (*Id.*).

In his Rule 56.1 Statement, Williams wrote: "[I]t is evident from the three reviews that Defendant Kong was clearly out to blackball the Plaintiff out of his job, even though Plaintiff was the most qualified of the candidates, having been on the team for five and one half years, having been JAVA 2 certified," and having a thorough knowledge of the other systems used. (Pltff's Rule 56.1 Statement at ¶ 138). Specifically, he asserts that, with regard to the three selection criteria, he had 10-plus years of experience in the full development project lifecycle; he was the only team member who was JAVA 2 Certified at the time he was terminated from the bank; and he had been doing trading floor support since 1989. (*Id.* at ¶¶ 131, 133-34).

On June 28, 2001, Peter Bibb flew in from London to tell Williams that his employment was being terminated. (Tr. #2: 107).

As Kong was also in the room, Williams asked if he could speak with Bibb privately and then told him, "Packaging me out does not solve your problem, you got a big problem on this team. Raymond Kong is the problem, not me." (Tr. #2: 108). Williams did not mention to Bibb that Kong had discriminated against him on the basis of his sexual orientation (Tr. #2: 109), nor did he mention to anyone at the bank that he was being terminated because he was gay. (Tr. #2: 38).

Also on June 28, Shannon Terry handed Williams a letter from the bank, stating that his position had been eliminated "due to changes in our business," and that his employment would be terminated on August 30, 2001. (Tr. #2: 113; CW Ex. BK). The letter informed him of the support services and benefits available, and indicated that Williams would receive his salary and benefits during the 60-day notice period preceding his termination date, eighteen weeks of severance, and a variety of career services. (Compl. ¶ 158; CW Ex. BK; Tr. #2: 107, 112-14, 120-21, 217). During Williams's conversation with Terry, he did not tell her that he felt discriminated against because he was gay. (Tr. #2: 115). He testified that he had wanted to talk to Shefferd that day to tell him that he believed Kong "did this because I'm gay," but Shefferd was not there. He "talked with Pat McGirt a little bit about it instead." (Tr. #2: 117). Upon further

questioning, Williams admitted that he had talked with McGirt after his termination, but did not recall the date. (Tr. #2: 117-18).

In a bizarre e-mail to Bibb dated June 28, 2001, Williams suggested that Bibb should contact a medium in order to find out "what is going on" with Kong and the LOPS team. In the same e-mail, he referred to an appointment that he had had with a psychic artist who allowed him to have a conversation with his deceased grandparents and who then drew a picture of them. (CW Ex. Z).

Following his termination, Williams sought to "negotiate" with the bank. (Compl. ¶ 124). In response to a November 21, 2001 letter written by Williams's then-counsel, Denise Bonnaig,[6] to the bank, Vice President John Ve[illegible]a wrote the following in a letter dated January 16, 2002:

> Please be advised that after a thorough investigation, I have determined that Mr. Williams was treated appropriately in all respects. His termination was based upon a legitimate business decision, specifically, a position elimination. Moreover, there is no

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[6] Williams testified about a "violent outburst" he had had on September 13, 2002 in Bonnaig's office: "I lost it. I mean, I basically, you know, I threw a glass on the floor, called her a stupid bitch, what do you think I'm not mental," and she called the police. (Tr. #1: 51-53). Shortly thereafter, Bonnaig moved to withdraw as counsel, an application that the court granted in an order filed October 16, 2002.

> evidence of discriminatory animus. Any claims to the contrary are false.

(CW Ex. B). Williams considered the statements in this letter libelous. (Tr. #2: 163-65). He testified that although Vega had said that his position was eliminated, it was not eliminated, as supposedly demonstrated by Keller's e-mail statement that he was an incumbent and that the role continued to exist. (Tr. #2: 164). He did not view the letter as expressing Vega's opinion. (Tr. #2: 165).

Williams also charged that the defendants' discriminatory animus was "ferociously demonstrated" by the fact that he was replaced by John Freund – revealing that his job was not eliminated. (Tr. #2: 165). He claims that approximately ten days after he served the bank with his complaint, the defendants "attempted to cover up the fact that Plaintiff had been replaced by illegally, inappropriately, and unfairly packaging out John Freund the employee who had been sitting in Plaintiff's former cubicle using Plaintiff's former phone extension, and working on the LOPS team's Java LOPS project as Plaintiff used to do when reporting to Defendant Kong." (Compl. ¶ 126 Tr. #2: 165).

In response to this contention, defendants submitted an affidavit from Shannon Terry, an Associate and Human Resources Generalist at the bank. (*See* Affidavit of Shannon Terry, sworn to on Aug. 13, 2004). Terry had been the bank official who prepared

and submitted a memorandum regarding the elimination of Freund's position, which she attached to her affidavit. (Terry Aff. at ¶ 3 & Ex. A). Terry averred that Williams's speculation about Freund's position and termination was wrong: Freund had been employed on the Rates and Global Books Teams as an Applications Developer on a project that was phased out in April 2002, and he occasionally provided assistance to Kong and the LOPS team. (Terry Aff., ¶ 4). Terry asserted that Kong never offered Freund a position on the LOPS team since all three positions had been filled. She also declared that the proposal to eliminate Freund's position had been submitted one week before Williams commenced his action, not ten days afterward. (*Id.* at ¶¶ 4, 5).

Williams charged in his complaint that, "upon information and belief," an internal bank investigation took place which resulted in Kong's termination in January 2003. (Compl. ¶ 127). In his summary judgment materials, Williams included Kong's letter of resignation, dated December 20, 2002 and effective January 3, 2003, indicating that he had accepted a position elsewhere. (CW Ex. JPMC 000369). Williams also asserted that a July 2002 "Climate Study" of Kong's group and a resulting warning issued to Kong in August 2002 confirm that Kong had engaged in discriminatory acts against him. He argued that the Climate Study acknowledges discriminatory comments made by Kong based on race and sexual orientation, and that it "demonstrates the extremely hostile, discriminatory, demeaning, psychologically

abusive work environment" that Kong created and that he endured for nearly four years. (Pltff's Rule 56.1 Statement ¶ 153; ¶ 158).

In her affidavit, Terry counters this assertion, stating that she conducted the Climate Study (an investigation into Kong's management style and ability, which involved interviews with team members) and prepared the warning issued to Kong. (Terry Aff., ¶¶ 7, 8). Terry claims that the Climate Study was not undertaken in response to Williams's situation but was based on concerns raised by employees on Kong's team in July 2002, after Williams had left. Also contrary to Williams's contentions, Terry stated that the Study did not conclude that Kong had discriminated against anyone, but rather that he had "numerous managerial issues that affected everyone on his Team." (*Id.* at ¶ 9). She made specific reference to notes she took during the Study (reprinted in Williams 56.1 Statement at pages 28-29).[7] Under the topic "Discriminatory Comments; Race/Sexual Orientation," she cited a comment by an African-American team member who thought Kong's statement to him that "People like you are not meant to be leaders" might be a racial slur. She also jotted down an "inappropriate" comment by a team member who overheard Kong say "You saw what happened to Christian, you are next." (*Id.* at ¶ 10).

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[7] A copy of the Climate Study and Kong's Warning Statement is attached to Williams's July 9, 2004 letter to the court.

Terry concluded that the first comment was not driven by discriminatory animus, but rather was prompted by Kong's "inappropriate managerial style," as he often told team members that they were "incompetent and not meant to lead," and the second comment reflected Kong's "personality clash with Plaintiff – when Mr. Kong referenced Plaintiff to team members, the universal assumption was that if a Team member disagreed with Mr. Kong's thinking and/or couldn't get along with him, he or she would eventually find themselves job eliminated (fired) like Plaintiff." (*Id.* at ¶ 11).

Also under the "Discriminatory Comments" heading of the study, Terry indicated that some team members "Reference[d] Christian Williams." (*Id.* at ¶ 10). Terry determined that the unspecified allegations "were nothing more than empty speculation; these Team members knew that Plaintiff was gay, that he had been job eliminated and assumed that Plaintiff's sexual orientation might have had something to do with his termination. No one, however, could provide any additional information which might show there was any connection between those facts." (*Id.* at ¶ 12). She added that "everyone" on Kong's team had issues with his managerial style, and had there been evidence of discriminatory animus, Kong would have been given a Final Written Warning or terminated immediately. (*Id.* at ¶ 13).

In July 2002, Williams began to see a psychiatrist. (Compl. ¶ 176). At his deposition, he produced an unnotarized "affidavit" signed by Dr. Henry

Beaulieu on October 8, 2002. (CW Ex. R). Dr. Beaulieu wrote that he saw Williams on Tuesdays at the Family Medical Practice in Brooklyn; that he diagnosed Williams as suffering from Acute Post Traumatic Stress Disorder and Prolonged Duress Stress Disorder "as a result of being psychologically abused at work and cruelly packaged out by his boss Mr. Raymond Kong," and that he prescribed certain drugs to assist with Williams's depression and anxiety. (*Id.*). Dr. Beaulieu regarded Williams's short-term and long-term prognosis as "good" if Williams complied with his medication and therapy regimen. (*Id.*).

Williams testified that, following termination, he visited a psychotherapist every two to three weeks. (Tr. #1: 20, 29-31). He also sought "professional counsel" from his friend, Angela Torres-Esteves, a retired Registered Nurse, to whom he talked once a week and whom he saw once a month. (Tr. #1: 9-11). He stated he was "never officially under her care," and she derived no compensation from tending to him. (Tr. #1: 11). At his deposition, Williams produced an affidavit from Ms. Torres-Esteves dated August 5, 2002 in which she opined that Williams "exhibits all the major symptoms of Post Traumatic Stress Syndrome as a result of Raymond Kong's pattern of malice against him," and described his symptoms in detail, including, *inter alia,* sleep problems, flashbacks, impaired memory, panic attacks, depression, physical numbness, occasional violent outbursts, and hypervigilance. (CW Ex. Q at ¶¶ 8-31). Williams surmised that he had begun suffering from PTSD symptoms

while he was working for Kong, but "the packaging out, basically pushed it up into acute PTSD." (Tr. #1: 12, 39). Williams also explained that his PTSD diagnosis allowed him to understand why he had been "obsessed" by Kong's behavior. (Tr. #1: 45, 61).

Williams stated that after he received Vega's response, his attorney told him that his only choice was to file a lawsuit. (Tr. #2: 178). He did not know if his attorney had filed administrative charges with the Equal Employment Opportunity Commission, the New York State Division of Human Rights, or the New York City Commission on Human Rights. (Tr. #2: 176-77).

ANALYSIS

I. Summary Judgment Standards

The court may enter summary judgment only if it concludes that there is no genuine dispute as to any material fact and that, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. *See, e.g., Island Software & Computer Svc., Inc. v. Microsoft Corp.,* 413 F.3d 257, 259 (2d Cir. 2005); *Whidbee v. Garzarelli Food Specialties Inc.,* 223 F.3d 62, 68 (2d Cir. 2000). It is axiomatic that the role of the court on such a motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried," *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986).

The movant bears the initial burden of informing the court of the basis for his motion and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that demonstrate the absence of a genuine issue of material fact. *See, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Koch v. Town of Brattleboro, Vermont,* 287 F.3d 162, 165 (2d Cir. 2002). In making this judgment, the court must view the record in the light most favorable to the non-moving party. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986); *Horvath v. Westport Library Ass'n,* 362 F.3d 147, 151 (2d Cir. 2004). If the non-moving party has the burden of proof on a specific issue, the movant may satisfy its own initial burden by demonstrating the absence of evidence in support of an essential element of the non-moving party's claim. *See, e.g., LaBounty v. Coughlin,* 137 F.3d 68, 73 (2d Cir. 1998); *Goenaga v. March of Dimes Birth Defects Found.,* 51 F.3d 14, 18 (2d Cir. 1995). If the movant fails to meet its initial burden, the motion will fail even if the opponent does not submit any evidentiary materials to establish a genuine factual issue for trial. *See, e.g., Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 160 (1970); *Giannullo v. City of New York,* 322 F.3d 139, 140 (2d Cir. 2003).

If the moving party carries its initial burden, the opposing party must then shoulder the burden of demonstrating a genuine issue of material fact. *See, e.g., Celotex,* 477 U.S. at 322; *Reeves v. Johnson Controls World Servs., Inc.,* 140 F.3d 144, 149 (2d Cir.

1998). In doing so, the opposing party cannot rest on "mere allegations or denials" of the factual assertions of the movant, Fed. R. Civ. P 56(e); *see, e.g., Rexnord Holdings, Inc. v. Bidermann,* 21 F.3d 522, 525-26 (2d Cir. 1994), nor can he rely on his pleadings or on unsupported assertions, conjecture, or conclusory factual allegations. *See, e.g., Goenaga,* 51 F.3d at 18. He must also "do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986), by presenting specific evidence in support of his contention that there is a genuine dispute as to one or more of the material facts. *See, e.g., Celotex,* 477 U.S. at 324; *Goenaga,* 51 F.3d at 18. "It is insufficient for a party opposing summary judgment 'merely to assert a conclusion without supplying supporting arguments or facts.'" *Minton v. Lenox Hill Hosp.,* 160 F.Supp.2d 687, 692 (S.D.N.Y. 2001) (quoting *BellSouth Telecomms., Inc. v. W.R. Grace & Co.,* 77 F.3d 603, 615 (2d Cir. 1996)). Summary judgment is as appropriate in employment discrimination cases as in other types of cases. *See Jetter v. Knothe Corp.,* 324 F.3d 73, 77 (2d Cir. 2003).

II. The Merits

The defendants challenge plaintiff's claims, asserting that there are no genuine issues of material fact with respect to any of those claims under state or local human rights laws.

A. Sexual Orientation Discrimination

1. Legal Standard

The NYSHRL, Executive Law § 296, and the NYCHRL, N.Y.C. Admin. Code § 8-107, both prohibit discrimination on the basis of sexual orientation. The NYSHRL provides:

> It shall be an unlawful discriminatory practice: For an employer . . . , because of the . . . sexual orientation . . . of any individual . . . to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment.

Exec. Law § 296(1)(a). Similarly, the NYCHRL provides:

> It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived . . . sexual orientation, . . . to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

N.Y.C. Admin. Code § 8-107(1)(a)

It is well-established that "[t]he standards for evaluating employment discrimination claims brought under state and city human rights laws are the same as those employed in assessing federally-based claims." *Thomas v. New York City Health & Hospitals Corp.*, 2004 WL 1962074, *11 (S.D.N.Y. Sept. 2, 2004)

(citing *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 n.1 (2d Cir. 2000); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 n.4 (2d Cir. 1995) (abrogated on other grounds by *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998)). *See also Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 391 (2004) ("The standards for recovery under the New York State Human Rights Law . . . are the same as the federal standards under title VII of the Civil Rights Act of 1964. . . . Further, the human rights provisions of the New York City Administrative Code mirror the provisions of the Executive Law and should therefore be analyzed according to the same standards."). Because Williams has not produced direct evidence of sexual-orientation discrimination, his claim is evaluated pursuant to the burden-shifting procedure set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Thus, to establish a discrimination claim based on sexual orientation, the plaintiff must demonstrate that he was subjected to an adverse employment action, and that his sexual orientation was a motivating factor in the action. *See McDonnell Douglas*, 411 U.S. at 802; *Weeks v. New York State (Div. of Parole)*, 273 F.3d 76, 85 (2d Cir. 2001); *Hester v. Rich*, 2004 WL 1872296, *7 (S.D.N.Y. Aug. 19, 2004) (citing *James v. N.Y. Racing Ass'n*, 259 F.3d 149, 153-54 (2d Cir. 2000)). The first step in undertaking such a showing involves proof of a *prima facie* case. *See, e.g., Reeves v. Sanderson Plumbing*, 530 U.S. 133, 142

(2000); *Windham v. Time Warner, Inc.*, 275 F.3d 179, 187 (2d Cir. 2001). Plaintiff's burden to establish a *prima facie* case is "minimal." *Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2d Cir. 1997) (*en banc*). He need only demonstrate that he is a member of a protected class, that he was qualified for his position, that his employer terminated him or subjected him to some other adverse employment action, and that this action took place in circumstances suggesting that it was motivated by plaintiff's membership in the protected class. *See, e.g., Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 91-92 (2d Cir. 2001); *James*, 233 F.3d at 154 (quoting *Fisher*, 114 F.3d at 1335).

If plaintiff makes a *prima facie* showing, the defendant "may rebut that showing by articulating a legitimate, non-discriminatory reason for the employment action." *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000). If the defendant can articulate such a non-discriminatory reason for its actions, the burden-shifting process is at an end, and the plaintiff is left with the obligation of demonstrating by a preponderance of the evidence that discriminatory animus was in fact a motivating factor in the action. *See Reeves*, 530 U.S. at 143; *Weinstock*, 224 F.3d at 42; *Fisher*, 114 F.3d at 1336. Thus, to survive a summary judgment motion, the plaintiff must make a showing that there is evidence upon which the trier of fact could find that defendant's proffered reason was false, and that discrimination was the reason for its actions. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S.

502, 515 (1993); *Fisher,* 114 F.3d at 1337. The Supreme Court in *St. Mary's Honor Center* observed, "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the Plaintiff's explanation of intentional discrimination." *Id.* at 519 (emphasis in original). The *Reeves* decision "clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Schnabel v. Abramson,* 232 F.3d 83, 90 (2d Cir. 2000) (quoting *Reeves,* 530 U.S. at 143).

2. Application

(a) Prima Facie Case

Defendants argue that Williams did not satisfy the requirements for a *prima facie* case because the matters about which he complains – such as being excluded from meetings, having his work discredited in front of teammates, being told that his computer code was not understandable, being assigned to less desirable work – were not "adverse employment actions." (Defts' Brief at 14). They also contend that a plaintiff's alleged subjection to "excessive scrutiny" or negative performance evaluations does not rise to the level of adverse employment actions, citing *Hernandez v. Kellwood Co.,* 2003 WL 22309326, *16 (S.D.N.Y. Oct. 8, 2003) and *Manessis v. New York City Dep't of Transp.,* 2003 WL 289969, *13 (S.D.N.Y. Feb.

10, 2003), *aff'd* 86 Fed. Appx. 464 (2d Cir. 2004). *Id.* at 14-15. They make no other challenges to plaintiff's *prima facie* case.

The Second Circuit holds that a "plaintiff may suffer an 'adverse employment action' if [he] endures a 'materially adverse change in the terms and conditions of employment." *Richardson v. N.Y. State Dep't of Corr. Serv.,* 180 F.3d 426, 446 (2d Cir. 1999). A materially adverse change might occur in the context of a "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Galabya v. N.Y. City Bd. of Educ.,* 202 F.3d 636, 640 (2d Cir. 2000). A materially adverse change in one's terms and conditions of employment is also defined as a change in working conditions that is "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Id.*

We agree with defendants that many of the complaints that Williams raised about how Kong treated him did not amount to "materially adverse changes" in his employment that rose to the level of an adverse employment action. Case law makes clear that "not everything that makes an employee unhappy is an actionable adverse action." *Phillips v. Bowen,* 278 F.3d 103, 117 (2d Cir. 2002). Williams does not argue that his exclusion from meetings caused him to lose benefits or other material indicia associated with his officer position, and thus these

type of complaints are not materially adverse changes in his employment.

At the same time, termination of employment is such a materially adverse change. Because Williams alleges that he was terminated as a result of his sexual orientation (Compl. ¶ 158), he has met this prong of his *prima facie* case. As far as the other prongs of his *prima facie* case, Williams, as a homosexual, is a member of a protected class under the NYSHRL and NYCHRL. He has shown that he was qualified for his position, as he "establish[ed his] basic eligibility for the position at issue," and showed that he "possesses the basic skills necessary for performance of [the] job." *Slattery,* 248 F.3d at 91-92. *See Windham,* 275 F.3d at 187. Finally, he has submitted the barest slivers of evidence – two comments that may possibly indicate an anti-gay bias, his statement to Gail Prescod that anti-gay bias was a concern of his with regard to Kong's treatment of him, and some post-termination references to Kong's possible anti-gay bias – suggesting that his termination might be motivated by his membership in the protected class. Particularly because defendants did not challenge the other prongs of Williams's *prima facie* case, and because the showing plaintiff must make is so minimal, we conclude that he made a *prima facie* showing.

(b) Plaintiff's Prextext Case

(1) A Neutral Reason

The defendants have articulated a legitimate reason for terminating Williams. They represent that Williams was terminated because of a restructuring and reduction in force that followed in the wake of the bank's merger with J.P. Morgan & Co. (Defts' Brief at 15-16). Defendants explain that the Technology and Operations Departments from the two banks consolidated into a single department; the managers of the new department determined that they would combine the Foreign Exchange and Interest Rates application developers teams into the FX Systems team; the new team would have three positions and one of the previous positions would be eliminated; they evaluated the four employees then employed on the Foreign Exchange and Interest Rates teams, which included Williams; they decided to terminate Williams "as the candidate with the worst potential going forward" (Defts' Brief at 16); the decision was reviewed by the Employee Relations Department, which approved the plan; and Williams was terminated. (*See* Palmer Aff. ¶¶ 3, 8-17).

The burden on the defendants at this stage is minimal. They are required only to articulate, not to prove, "some legitimate, nondiscriminatory reason" for their employment decision. *McDonnell Douglas,* 411 U.S. at 802. "Any stated reason is sufficient; the employer need not persuade the court that the proffered reason was the actual reason for its decision,"

Tarshis v. Riese Org., 211 F.3d 30, 36 (2d Cir. 2000), and a reduction-in-force or restructuring resulting in an elimination of jobs "often is a legitimate reason for dismissing an employee." *Id.* at 37. Thus, although Williams argues that his job was not eliminated and insinuates that the defendants' reason was false, defendants need only proffer a legitimate reason for their action, and they have certainly carried their burden by pointing to their restructuring and consolidation process as such a reason.

(2) Pretext and Discrimination

Williams's claim of sexual orientation discrimination founders because he fails to provide evidence sufficient for the trier of fact to find that defendants' proffered reason was false, and that discrimination was the reason for their actions.

There does appear to be a disconnect between the selection criteria listed on the template against which the four candidates for the new team were evaluated – which were solely experience-based – and Kong's evaluation of Williams. That assessment was based more on Williams's negative attitude than on his experience, which clearly outpaced the other candidates. But the anti-discrimination statutes "may not be used as a vehicle for second-guessing an employer's business judgment," *Davidson v. Time, Inc.*, 972 F.Supp. 148, 153 (E.D.N.Y. 1997), and an employer may make "bad business judgments" as long as its decisions were not made for prohibited discriminatory

reasons. *Brown v. Society for Seaman's Children,* 194 F.Supp.2d 182, 191 (E.D.N.Y. 2002) (quoting *Brown v. Time, Inc.,* 1997 WL 231143, at *12 (S.D.N.Y. May 7, 1997)). The fact that Kong rated Williams the lowest of all the candidates based upon his problems in fitting into the organizational structure is a lawful reason not to choose him, despite his experience.

Moreover, although Williams vociferously disagreed with the negative evaluations of his performance and the final negative evaluation which resulted in his termination from employment, there is no basis in the record from which a rational juror could find that the reasons upon which his termination was based were false or a pretext for discrimination. The court in *Taylor v. Polygram Records,* 1999 WL 124456 (S.D.N.Y. May 8, 1999), expressed this dynamic eloquently:

> [Plaintiff's] attempt to rebut Defendants' proffered explanation by parsing the details of selected incidents, generally disputing her supervisors' assessments, and providing her own contrary appraisal of her work, is unavailing. Her Affidavit and memoranda may raise issues concerning the reasons *why* she failed to perform her job. . . . But faulting others for, or otherwise rationalizing, problems legitimately perceived by her employer does not establish pretext . . . [Plaintiff's] fundamental disagreement with the conclusions her supervisors drew . . . is not evidence that her supervisors' appraisals

> were a sham, invented to mask discrimination.

Id. at *10 (emphasis in original).

Further, Williams was unable to raise an issue that the defendants' reason was pretextual by speculating that Freund replaced him and thus defendants' statement that his position was eliminated was false. Williams reported his belief as to Freund's role, but offered no basis for inferring any personal knowledge of the pertinent facts. His speculation is simply not admissible, and hence cannot be considered in assessing defendants' summary judgment motion. *See, e.g., Goenaga,* 51 F.3d at 18. The only competent evidence as to Freund's position was provided by defendants through the affidavit of Shannon Terry, who made clear that Freund had not replaced Williams. In short, there is no triable dispute on this question.

Even if defendants' reason had been pretextual, Williams would still be on the losing end of his discrimination claim. A showing that the defendants' legitimate, non-discriminatory reason for its adverse employment decision was pretextual is not enough. "The plaintiff must also prove by a preponderance of the evidence that defendant's stated reason is 'a pretext for discrimination'." *Fisher,* 70 F.3d at 1433; *accord, e.g., Fisher,* 114 F.3d at 1338-40. As discussed above, Williams provides no facts to support a conclusion that his termination was motivated, even in part, by animus towards his sexual orientation. He provided no direct evidence of sexual orientation

animus, *i.e.*, a direct statement by any defendant reflecting anti-gay bias. The two comments uttered by Kong that Williams considered as such evidence are ambiguous at best: Kong's reference to him as "Christine" in 1997 and his date-unspecified comment that arguing with Williams was like arguing with his wife. It is questionable whether either statement suggests any discriminatory animus. The fact that Kong also made the second statement to a female employee betrays Kong's equal opportunity attitude toward people who argue with him, whether gay or straight, male or female, as opposed to an expression of anti-gay bias.

Although the record indicates that Kong was not the ultimate decisionmaker in plaintiff's termination – as Peter Bibb was the bank official who relayed that decision to him – Kong still played a substantial role in the decision-making process, as the management's decision not to hire Williams on the new FX Systems team was based upon his recommendation. Even if we regard him as a decisionmaker, however, these remarks – one of which was made five years before plaintiff's termination – would not sustain plaintiff's claim. Stray remarks by decisionmakers "unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision." *Ezold v. Wolf, Block Schorr and Solis-Cohen,* 983 F.2d 509, 545 (3d Cir. 1992). For stray remarks to be deemed significant, the plaintiff must show a nexus between the remark(s) and the adverse employment decision. *See Danzer v. Norden*

Sys., Inc., 151 F.3d 50, 56 (2d Cir. 1998). In this case, plaintiff fails to link Kong's two ambiguous statements to his eventual termination. Without such a nexus, Kong's reference to Williams as "Christine" and his alleged statement that "Arguing with you is like arguing with my wife" qualify as those kinds of "stray remarks" that, without more, are insufficient to support an inference of employment discrimination. *See Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir. 2001); *Woroski v. Nashua Corp.*, 31, F.3d 105, 109-10 (2d Cir. 1994).

The only other bit of evidence in the record concerning anti-gay bias is found in the Climate Study conducted on Kong, in which, under the "Discriminatory Comments-Race/Sexual Orientation" heading, Shannon Terry noted "References Christian Williams." As the person who conducted the Climate Study and investigated the matter, Terry explained this passing reference as based solely upon the speculation of team members who knew that Williams was gay and that his job had been eliminated, and who therefore assumed that his sexual orientation may have had something to do with his termination. (*See* Terry Aff., ¶ 12). Williams, who approached numerous bank employees in an effort to solicit affidavits to support his case (Tr. #1: 130), provided no evidence that would raise an issue of material fact that other team members heard Kong make any anti-gay references regarding him, his termination, or in any other capacity. Thus, this item in the Climate Study does

not raise a question of material fact on the issue of discriminatory animus.

In addition, the record is bereft of evidence that Williams complained to anyone at the bank that Kong had discriminated against him or terminated him because he was gay. The closest Williams came to suggesting that Kong was motivated by sexual-orientation bias was in 1998, when Prescod asked him whether Kong was treating him badly because he was anti-gay. Even then, Williams equivocated, responding "I don't know," and added "It is a concern of mine." Should this comment have served to put the bank on notice, as Williams claims it did (Compl. ¶ 119), he did not follow up with any specific complaints to anyone over the course of the next three years. For a person like Williams, who showed no aversion to communicating his thoughts to bank officials and to Kong himself regarding Kong's less-than-effective management style, the fact that the record is blank as to any complaints by him or anyone else linking Kong's management style with anti-gay bias underscores the absence of concrete evidence that Kong's treatment of him – as distinct from his apparent mistreatment of others under his aegis – was motivated by homophobia.

While it cannot be gainsaid that Kong's personality and management abilities were questionable – so much so that he eventually found other employment after receiving a warning – the record reveals that no one on his team was exempt from his negative approach. (*See* Climate Study/First Warning, attached

to Williams's July 9, 2004 letter to the court). It appears that Kong particularly had issues with Williams's performance and negative attitude toward authority (which were echoed, to an extent, in performance evaluations written by others), and that Williams may have been more sensitive than others on the team to Kong's treatment of him. However, these dynamics do not mean that Kong was anti-gay. Kong's rude and combative attitude may evidence hostility between him and Williams, but "does not provide ground for inferring that the hostility stemmed from plaintiff's" sexual orientation without some nexus, which Williams has been unable to provide. *See Brown,* 194 F.Supp.2d at 192; *Taylor,* 1999 WL 124456 at *17 (holding that the manager's criticism of the employee and accompanying lack of cordiality, was not evidence of discrimination).

Williams may have believed that the impetus behind Kong's engaging in the personality conflict was anti-gay bias. To make up for lack of evidence on this score, Williams peppered his complaint with instances of Kong's bad treatment and linked it to anti-gay bias by his conclusory statements and repeated expressions of his fervent belief that it was so. But his *ipse dixit* that Kong was biased cannot save his claim on summary judgment. *See, e.g., Slaitane v. Sbarro,* 2004 WL 1202315, *18 (S.D.N.Y. June 2, 2004) (plaintiff's "*ipse dixit* is not admissible evidence" in summary judgment motion); *Taylor,* 1999 WL 124456, at *16 (plaintiff's "belief, based on no evidence other than gut instinct, that [her supervisor]

treated her with hostility because of her race, cannot justifiably support an inference of discrimination" when nothing in the record supported that linkage). Plaintiff's repeated assertion that the problems he suffered on the job, which led to his eventual termination, were attributable to discriminatory animus is purely conclusory. Indeed, it simply repeats what Williams must prove to show that discriminatory animus motivated his termination. As difficult as his work conditions may have been, the courts have recognized that "personality conflicts between employees are not the business of federal courts," *Figueroa v. City of New York,* 2002 WL 31163880, *3 (S.D.N.Y. Sept. 27, 2002) (quoting *Vore v. Indiana Bell Tel. Co.,* 32 F.3d 1161, 1162 (7th Cir. 1994)), and that the federal discrimination laws do not impose a "general civility code." *Farragher v. City of Boca Raton,* 524 U.S. 775, 787-88 (1998).

B. Discrimination Based on Perceived Disability

Williams also claims that Kong discriminated against him on the basis of perceived disability, *i.e.,* an erroneous perception that he was HIV+. (Compl. ¶ 146).

Both the NYSHRL and NYCHRL protect individuals from discrimination on the basis of disability or perceived disability. Executive Law Section 296(1)(a) provides that it is an unlawful discriminatory practice for an employer to discharge an employee or to discriminate against an individual in

compensation or in terms, conditions or privileges of employment based upon the person's disability. "Disability" is defined in Executive Law § 292(21)(c) as, *inter alia*, "a condition regarded by others" as a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions. The NYCHRL similarly provides that it shall be an unlawful discriminatory practice for an employer to discharge or otherwise discriminate against an individual because of that person's "actual or perceived . . . disability." N.Y.C. Admin. Code § 8-107(1)(a).

Courts have found that, "[f]or the most part, disability claims brought pursuant to the NYSHRL and the *NYCHRL* are construed similarly to ADA claims." *Hester*, 2004 WL 1872296, *7 (citing cases). The *prima facie* elements of an ADA claim are: "(1) plaintiff's employer is subject to the ADA; (2) plaintiff was disabled within the meaning of the ADA; (3) the plaintiff was otherwise qualified to perform the essential functions of [his] job, with or without reasonable accommodation; and (4) plaintiff suffered [an] adverse employment action because of [his] disability." *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 63 (2d Cir. 2003). "[I]ndividuals with 'a physical or mental impairment that substantially limits one or more of the major life activities of such individual'" are disabled within the meaning of the ADA. *Felix v. N.Y. City Transit Auth.*, 324 F.3d 102, 104 (2d Cir. 2003) (quoting 42 U.S.C. § 12102(2)(A)). A plaintiff is "considered 'disabled'

under the ADA if [he] is 'regarded as' suffering from a physical or mental impairment that 'substantially limits one or more of the major life activities,' even if [he] does not actually suffer from such an impairment." *Cameron,* 335 F.3d at 63 (quoting 42 U.S.C. § 12102(2)(A) & (C)) .

Under the "regarded as disabled" section of the statute, "the decisive issue is the employer's *perception* of his or her employee's alleged impairment." *Giordano v. City of New York,* 274 F.3d 740, 748 (2d Cir. 2001). Thus Williams must show "not only that the defendants 'regarded [him] as somehow disabled,' but that they 'regarded [him] as disabled *within the meaning of the ADA.*'" *Id.* (quoting *Colwell v. Suffolk County Police Dep't,* 158 F.3d 635, 646 (2d Cir. 1998) (emphasis in original)).

Courts follow "a three-step process for determining whether a plaintiff has a disability" protected by the ADA, *id.* at 641, and consider: (1) "whether the plaintiff suffered from a physical or mental impairment," (2) whether "'the life activity' upon which the plaintiff relied . . . constitutes a major life activity under the ADA," and (3) whether "the plaintiff's impairment 'substantially limited' [the] major life activity identified." *Id.* at 641. Defendants assert that Williams never identified a major life activity that they regarded him as unable to perform because of his allegedly erroneously perceived disability, and assume, for purposes of this motion, that he meant to assert that they regarded him as being unable to

work because of that perceived disability. (Defts' Brief at 20-21).

In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Supreme Court explained that an employee can be 'regarded as' disabled in two ways: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Id.* at 489. Williams's allegations fall within the former category. However, the only "evidence" that he introduced in an effort to establish that Kong (and apparently by extrapolation, the other defendants) regarded him as disabled is his syllogistic and conclusory reasoning that has no basis other than his belief that it is so: "So what Raymond saw is, well, if closeted Bob Fisch is going every week to see his AIDS doctor, and out Christian is going every week to every other week to see his doctor, he must be HIV positive, too, and that's a conclusion that I firmly believe basically." (Tr. #1: 126). Williams cites no statements that Kong or anyone else at the bank made concerning his alleged perceived HIV+ status. He points only to Kong's ubiquitous "pattern of malice" towards him and asserts that it was prompted by Kong's sexual-orientation animus and his perception that he was HIV+. (Tr. #2: 195). Basically, he has tacked his perceived disability claim onto his sexual-orientation discrimination claim, citing the same complaints as evidence of both

forms of discrimination. Moreover, he did not arrive at the conclusion that perceived HIV+ status may have played a part in Kong's treatment of him until sometime after he had left the bank. (Tr. #1: 132).

In addition, to make out a claim that one is regarded as disabled because they are viewed as being substantially impaired in the major life activity of working, a plaintiff must establish that he was regarded as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs." 29 C.F.R. § 1630.2(j)(3)(i). Williams does not even attempt to provide evidence to support this claim; he rather considers the claim in a literal, not legal, sense as one more element in Kong's negative treatment of him. Accordingly, he has failed to satisfy two elements of his *prima facie* case – that he was disabled within the meaning of the ADA and that he suffered an adverse employment action because of his disability. In sum, this claim fails as well.

C. Hostile Work Environment

Williams asserts that Kong created and maintained a "hostile harassment filled psychologically abusive work environment," and that Chase allowed him to do so. (Compl. ¶¶ 87, 106). Defendants respond that Williams's claim "must fail because he cannot establish that discriminatory conduct was frequent, severe or pervasive or physically threatening" (Defts' Brief at 22). They also cite cases such as *Viruet v. Citizen Advice Bureau*, 2002 WL 1880731, *16

(S.D.N.Y. Aug. 15, 2002), where the district court rejected a sexual-orientation hostile-environment claim – despite the plaintiff's supervisor having asked him whether he had AIDS or HIV and despite clients having called plaintiff a "faggot" – because plaintiff's "run-ins" with his supervisors were due to his "strong personality," not to his sexual orientation. (Defts' Brief at 23).

The same standard applies to hostile-work-environment claims brought pursuant to the NYSHRL, the NYCHRL, and Title VII. *See Palomo v. Trustees of Columbia Univ.*, 2005 WL 1683586, *14 (S.D.N.Y. July 20, 2005), citing *Cruz*, 202 F.3d at 565 n.1 and *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 765 (2d Cir. 1998). To prevail on a claim that harassment caused a hostile work environment in violation of Title VII (and the state and city statutes), a plaintiff must establish: "(1) that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, and (2) that a specific basis exists for imputing the objectionable conduct to the employer." *Alfano v. Costello,* 294 F.3d 365, 373 (2d Cir. 2002) (citation omitted).

A hostile-work-environment claim is "based on the cumulative effect of individual acts." *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 115 (2002). The statutes are violated "when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and

create an abusive working environment." *Id.* at 116. The alleged conduct "must be sufficiently continuous and concerted in order to be deemed pervasive." *Feingold v. New York,* 366 F.3d 138, 150 (2d Cir. 2004). "Isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness." *Alfano,* 294 F.3d at 374.

Hostile-work-environment claims must also meet both objective and subjective standards. Not only must the victim "subjectively perceive [the] environment to be abusive," but the misconduct of which the plaintiff complains must also be "severe or pervasive enough to create an objectively hostile or abusive work environment." *Petrosino v. Bell Atlantic,* 385 F.3d 210, 221 (2d Cir. 2004).

Williams has not presented sufficient evidence for a jury to infer that the defendants created a hostile work environment during his employment at the bank that was based on forbidden discriminatory animus.[8] His complaint is laden with allegations and examples of instances where he subjectively perceived his work environment to be abusive. Given his revulsion for Kong, Kong's very presence appeared to turn his work environment hostile. But although Williams subjectively perceived a hostile work environment,

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[8] In view of this conclusion, we need not determine whether the evidence proffered by plaintiff, if credited, could demonstrate a sufficiently pervasive hostile environment, irrespective of the source of the adverse work conditions.

the evidence does not permit a finding that the alleged adverse conditions were triggered by animus to his sexual orientation or perceived disability. As we have noted, all of the proffered evidence appears to reflect hostility rooted in the personality conflict in which Williams and Kong were engaged and which Williams himself acknowledged in an e-mail to Gary Ford in 2001. (CW Ex. Y). Moreover, the record evidences that Kong was antagonistic to most of those he supervised, which eventually resulted in his being issued a warning. That pattern also underscores the notion that Kong was not singling out Williams for harsh treatment based on his status. This lack of evidence of illegal animus is fatal to Williams's hostile-environment claim. *See Petrosino,* 385 F.3d at 221, 223 (quoting *Mack v. Otis Elevator Co.*, 326 F.3d 116, 122 (2d Cir. 2003); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); and *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)) (cases which hold that, to establish a hostile work environment, plaintiff must show, *inter alia,* that the workplace was "permeated with *discriminatory* intimidation, ridicule and insult" that was severe or pervasive enough to alter the conditions of the work environment) (emphasis added)); *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) (reiterating that conduct complained of in hostile-work-environment claim must have been prompted by victim's status). Because Williams has not presented evidence from which a jury could find an objective level of hostility based on such animus, we recommend that this claim be dismissed.

D. Retaliation

Williams contends that Kong retaliated against him for "whistle blowing" Kong's actions to personnel and higher management (Compl. ¶ 114). He also avers that Kong engaged in "post-termination retaliation and prevented Plaintiff from obtaining re-employment on account of Plaintiff's sexual orientation and perceived disability." (Compl. ¶ 175). In addition, he asserts that the bank retaliated – apparently against him – by "packaging out" John Freund subsequent to the defendants being served with the initial complaint. (Compl. ¶¶ 80, 139).

Both the NYSHRL and the NYCHRL prohibit an employer from retaliating against an employee who opposes allegedly unlawful employment practices or assists in any investigation of such practices. *See* N.Y. Exec. Law §§ 296(1)(a), 296(7), N.Y.C. Admin. Law § 8-107(7). Courts apply the *McDonnell Douglas* burden-shifting approach to analyze claims of retaliation. *See Terry v. Ashcroft,* 336 F.3d 128, 141 (2d Cir. 2003). "However, before any burden-shifting may be performed, a plaintiff must first demonstrate a *prima facie* case for retaliation." *Belardo v. Con-Way Transp. Servs., Inc.,* 2005 WL 885016, *7 (E.D.N.Y. Mar. 28, 2005). "In order to establish a *prima facie* case . . . , an employee must show (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action." *Feingold,* 366 F.3d at 156. "For a plaintiff's conduct to constitute

participation in a protected activity, it is enough that he has made 'informal protests of discrimination, including making complaints to management.'" *Palomo,* 2005 WL 1683586 at *17 (quoting *Gregory v. Daly,* 243 F.3d 687, 700-01 (2d Cir. 2001)). Once the plaintiff has made out his *prima facie* case, the defendants must articulate a legitimate and nondiscriminatory or non-retaliatory reason for their action. *See McDonnell Douglas,* 411 U.S. at 802-03. Then the burden shifts back to plaintiff, who must produce evidence sufficient to raise an issue of fact as to whether the defendants' justification was merely a pretext for discrimination or retaliation. *See Quinn,* 159 F.3d at 769.

Williams cannot make out a *prima facie* case of retaliation. By his own admission, he never complained to any bank official – with the exception of Prescod in 1998 – that he felt Kong's mistreatment of him was based in discriminatory animus. (Tr. #1: 134; Tr. #2: 87-88, 90-91, 159). Thus, he did not engage in protected activity known to the defendants. They were aware he was complaining about Kong, but not that he was complaining about discriminatory treatment. Even his exchange with Prescod is equivocal. When she asked him directly whether Kong was "anti-gay," Williams responded, "I don't know, but it is a concern of mine." (Compl. ¶ 119). Even assuming that the comment to Prescod qualified as "protected activity," Williams cannot show any nexus between that complaint and his termination. "Retaliatory intent may be inferred from an adverse employment

action that follows closely on the heels of the protected activity. By the same token, when no other evidence of a causal connection exists, a lack of temporal proximity can defeat a claim of retaliation." *Thomas,* 2004 WL 1962074, *18 (citations omitted). The complaint to Prescod was made years before Williams was terminated, which defeats the causal connection required to make out a *prima facie* case.

Williams also provides no factual support for his claim that Kong engaged in post-termination retaliation. He does not clarify what behaviors he objects to – *i.e.*, whether he is even asserting that Kong may have provided negative job references once he left the bank – and he offers no competent evidence of such possible misconduct. He also does not explain how the defendants could have retaliated against him by "packaging out" Freund.

Williams's allegations do not raise a genuine issue of material fact as to whether any pre- or post-termination retaliation took place. Accordingly, he cannot make out a *prima facie* case of retaliation, whether in the form of his termination or negative employment references provided after his termination.

E. Intentional Infliction of Emotional Distress

Williams asserts that Kong's "hostile verbal and hostile nonverbal communication," his "interfering actions" and "desire to control rather than manage the Plaintiff," and the range of behaviors that

Williams has collected under the rubric "Workplace Bullying" constituted intentional infliction of emotional distress. (Compl. ¶ 51)

Under New York law, a claim for intentional infliction of emotional distress requires a showing of: "(1) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." *Conboy v. AT&T Corp.*, 241 F.3d 242, 258 (2d Cir. 2001). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Howell v. New York Post*, 81 N.Y.2d 115, 122, 596 N.Y.S.2d 350, 353 (1993). "New York courts are exceedingly wary of claims for intentional infliction of emotional distress in the employment context because of their reluctance to allow plaintiffs to avoid the consequences of the employment-at-will doctrine by bringing a wrongful discharge claim under a different name." *Mariani v. Consolidated Edison Co.*, 982 F.Supp. 267, 275 (S.D.N.Y. 1997), *aff'd*, 172 F.3d 38 (2d Cir. 1998). "The rare instances where the New York courts have found the complaint sufficient to state an [intentional infliction of emotional distress] claim in the employment context generally involve allegations of more significant battery, or improper physical contact."

Gilani v. Nat'l Ass'n of Secs. Dealers, Inc., 1997 WL 473383 at *14 (S.D.N.Y. Aug. 19, 1997).

Against this high standard, Williams utterly fails to raise a genuine issue of material fact as to whether defendants intentionally caused him emotional distress. Williams's evidence that Kong once called him Christine and told him that arguing with him was like arguing with his wife, and that Kong persistently bullied him (behaviors that did not rise to the level of battery), simply does not rise to the level of "extreme and outrageous conduct" that would "justify [his] intentional infliction of emotional distress claim." *Daniels v. Health Ins. Plan of Greater New York*, 2005 WL 1138492, *3 (S.D.N.Y. May 12, 2005) (citing *Benjamin v. N.Y. City Dept of Health*, 2002 WL 485731, *9 (S.D.N.Y. Mar. 29, 2002) (denying plaintiff's claim, which was based on allegations of "disparate treatment, humiliation, and insults" at the workplace); *Lydeatte v. Bronx Overall Econ. Dev. Corp.*, 2001 U.S. Dist. LEXIS 1670 at *4-*7 (S.D.N.Y. Feb. 22, 2001) (plaintiff claimed she had been harassed, denied benefits received by her Hispanic coworkers, wrongfully terminated, and retaliated against by her employer; the court held that while plaintiff might have an employment-discrimination claim, the conduct alleged was insufficient to state a claim for intentional infliction of emotional distress).

Moreover, Kong's statements and behavior fall outside the one-year statute of limitations for intentional-infliction-of-emotional-distress claims. *See Greene v. Trustees of Columbia Univ.*, 234 F.Supp.2d 368, 382

(S.D.N.Y. 2002). Williams originally filed his suit on May 2, 2002 and thus he is time-barred from complaining about any conduct that occurred prior to May 2, 2001. As defendants point out, "with the exception of the termination of employment, all of Plaintiff's allegations relate to events that took place prior to May 2, 2001" and are thus untimely. (Defts' Brief at 26). As for plaintiff's termination, it is not sufficient to raise a genuine issue of material fact in support of an intentional-infliction-of-emotional-distress claim. *See Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 293, 303, 461 N.Y.S.2d 232, 233, 236 (1983) (finding that plaintiff's allegations that he was transferred and demoted for reporting fraud, coerced to leave by being told that he would never be allowed to advance, discharged and ordered to leave immediately after reporting other alleged in-house illegal conduct, and forcibly and publicly escorted from the building by guards when he returned the next day to pick up his belongings, fell "far short" of the "strict standard" for outrageous behavior). Accordingly, this claim does not survive summary judgment.

F. Negligent Infliction of Emotional Distress

Williams asserts that the bank, and the individual defendants other than Kong, inflicted "emotional duress" on him by "acting as aider and abettor, jointly and severally by ignoring Plaintiff's complaints, the complaints of others, their own existing policies and procedures," and that they thereby enabled and sanctioned Kong's "previously listed psychologically

abusive workplace bullying tactics." (Compl. ¶ 184). When asked at his deposition to specify the facts underlying this claim, Williams basically repeated his charges: "They never did anything to solve the problem. I was never moved and put on to another team. They didn't seem to discipline Raymond Kong in any way. I don't think they took any of my allegations seriously." (Tr. #2: 188).

Under New York law, a plaintiff may establish a claim for negligent infliction of emotional distress in one of two ways: "(1) the 'bystander' theory; or (2) the 'direct duty theory.'" *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir. 2000) (quoting *Mortise v. United States*, 102 F.3d 693, 696 (2d Cir. 1996)). Under the bystander (or zone-of-danger) theory, which is clearly inapplicable in this case,

> a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence.

Bovsun v. Sanperi, 61 N.Y.2d 219, 223-24, 473 N.Y.S. 2d 357, 358 (1984). Under the 'direct duty' theory, a plaintiff suffers emotional distress caused by "defendant's breach of a duty which unreasonably endangered [plaintiff's] own physical safety." *Mortise*, 102

F.3d at 696. Such a claim can only be upheld if the defendant owes a "direct duty" to the plaintiff that "could give rise to a special obligation to avoid negligently causing [him] emotional distress." *Druschke v. Banana Republic, Inc.*, 359 F.Supp.2d 308, 315 (S.D.N.Y. 2005), citing *Mortise*, 102 F.3d at 696. As an example of circumstances in which negligent infliction of emotional distress claims were not viable, the *Druschke* court cited *Kelly v. Chase Manhattan Bank*, 717 F.Supp. 227, 235 (S.D.N.Y. 1989), which dismissed a claim for negligent infliction of emotional distress made by a discharged employee against her employer, concluding that "although the employer may have owed the employee other duties, such as the duty to act honestly and in good faith in its employment practices, it would not be liable for negligent infliction of emotional distress because it did not owe the plaintiff employee a special duty to avoid causing emotional distress." 359 F.Supp.2d at 315. Here, Williams's physical safety was not unreasonably endangered by the defendants' negligence, nor did the defendant bank owe him a special duty.

Moreover, as defendants have asserted, "In New York, recovery for accidental injuries arising out of and in the course of employment, including injuries caused by an employer's negligence, is governed by the Workers' Compensation Law." *Johns v. The Home Depot USA., Inc.*, 2005 WL 545210, *8 (Mar. 8, 2005) (citation omitted). Under New York's Workers' Compensation Law, "psychological or nervous injury precipitated by psychic trauma is compensable to the

same extent as physical injury." *Id.* (quoting *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 510, 369 N.Y.S.2d 637, 641 (1975)). Since Williams alleges psychological injuries, the defendants' allegedly negligent actions that caused his emotional distress are governed by Workers' Compensation. If Williams's claim was meritorious, he could recover under that statute, and thus he may not recover in this lawsuit. *See* N.Y. Work. Comp. Law § 11.

G. Defamation Claims

Williams asserts a libel claim based on John Vega's statement in his January 16, 2002 letter that "there is no evidence of discriminatory animus. Any claims to the contrary are false." According to plaintiff, Vega effectively called him a liar in writing. He also avers that Kong libeled him in his 1998 review. (Compl. ¶¶ 124, 224; Tr. #2: 167). In addition, he claims that Kong slandered him "to at least one interviewer for a transfer position" in May-June 2000. (Compl. ¶ 226; Tr. #2: 172-73).

Both versions of these claims are time-barred. Under New York law, defamation claims (slander and libel) are subject to a one-year statute of limitations. *See Solas v. Jones*, 2005 WL 525444, *2 (S.D.N.Y. Mar. 7, 2005) (citing N.Y. C.P.L.R. § 215(3)). "The statute of limitations begins to run from the date that the defamatory statement is published." *Id.* Accordingly, Williams may not recover on his claim that Kong libeled him in his 1998 review, or that Kong

slandered him to an interviewer in May-June 2000, because both dates fall outside of the one year limitations period preceding the filing of his initial complaint in May 2002.

Apart from their untimeliness, these claims are plainly baseless. "A claim for defamation requires a showing that the defendant committed either libel or slander." *Campbell v. Kane, Kessler, P.C.*, 2004 WL 1234048, *6 (S.D.N.Y. June 2, 2004). Libel is defined as a "publication, expressed in printing or writing . . . concerning a living person which is false and tends to injure his reputation and thereby expose him to public hatred, contempt, scorn, obloquy, or shame." *Id.* (citation omitted). *Accord Golub v. Enquirer/Star Group, Inc.*, 89 N.Y.2d 1074, 1076, 659 N.Y.S.2d 836, 837 (1997). On the other hand, slander "constitutes an injury to a person's reputation or good name by malicious or scandalous words." *Campbell*, 2004 WL 1234048 at *6 (citation omitted).

To recover on an action for libel under New York law, a claimant must establish five elements: "(1) a written defamatory statement of fact concerning the claimant, (2) publication to a third party, (3) fault (either negligence or actual malice depending on the status of the libeled party), (4) falsity of the defamatory statement, and (5) special damages or per se actionability defamatory on its face," *Johns*, 2005 WL 545210, at *9 (citing *Celle v. Filipino Reporter Enter., Inc.*, 209 F.3d 163, 176 (2d Cir. 2000)). Williams testified that, to his knowledge, Vega did not share his letter to Williams's attorney with anyone else.

(Tr. #2: 167). Williams's attorney shared it with him, and he forwarded it to the Secretary of Labor and showed it to other prospective attorneys. *Id.*

Under New York law, "publication occurs when libelous words are read 'by someone other than the person libeled and the person making the charges.'" *Solas,* 2005 WL 525444 at *3 (quoting *Fedrizzi v. Washingtonville Cent. Sch. Dist.*, 204 A.D.2d 267, 268, 611 N.Y.S.2d 584, 585 (2d Dep't 1994)). "When a plaintiff engages an attorney to correspond with another party in regards to a 'special matter' between the parties, however, a private letter answering plaintiff's attorneys does not constitute publication in a libel action under New York law." *Solas,* 2005 WL 525444 at *3 (quotation omitted). Thus, Vega's letter was not "published" for the purpose of a libel claim because he wrote it in direct response to a letter from Williams's attorney, and plaintiff may not recover on this claim.

Moreover, Vega is protected by a qualified privilege. "A qualified privilege arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding interest or duty." *Santavicca v. City of Yonkers,* 132 A.D.2d 656, 657, 518 N.Y.S.2d 29, 31 (2d Dep't 1987). Communications are regarded as privileged where the occasion and the relation of the parties afford reasonable grounds for supposing an innocent motive for giving the information. *See Anas v. Brown,* 269 A.D.2d 761, 762, 702

N.Y.S.2d 732, 734 (4th Dep't 2002). In addition, "to the extent that statements are made about employees in an employment context, they qualify as privileged since such statements were made by one person to another upon a subject in which they have a common interest." *Hawkins v. City of New York,* 2005 WL 1861855, *19 (S.D.N.Y. Aug. 4, 2005) (citing *Williams v. Varig Brazilian Airlines,* 169 A.D.2d 434, 438, 564 N.Y.S.2d 328, 331 (1st Dep't 1991)). "The shield of privilege is pierced only by a plaintiff's showing of actual malice." *Hawkins,* 2005 WL 1861855 at *19 (citing, *Hollander v. Cayton,* 145 A.D.2d 605, 636, 536 N.Y.S.2d 790, 792 (2d Dep't 1988)). "To overcome a qualified privilege, it is plaintiff's burden to show actual malice." *Id.* (quoting *Buckley v. Litman,* 57 N.Y.2d 516, 521, 457 N.Y.S.2d 221, 223 (1982). Williams has not offered any evidence suggesting that Vega was motivated by malice in making his statement, and thus this claim fails as well.

CONCLUSION

For the reasons stated, we recommend that defendants' motion for summary judgment be granted.

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies to be delivered to the chambers of

the Honorable George B. Daniels, Room 410, 40 Foley Square, and to the chambers of the undersigned, Room 1670, 500 Pearl Street, New York, New York 10007. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Thomas v. Arn,* 474 U.S. 140, 150 (1985); *Small v. Secretary, of Health and Human Services,* 892 F.2d 15, 16 (2d Cir. 1989); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: New York, New York
August 19, 2005

Respectfully submitted,

/s/ [Illegible]
MICHAEL H. DOLINGER
UNITED STATES
MAGISTRATE JUDGE

Copies of the foregoing Report and Recommendation have been mailed this date to:

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